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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY

HORACE GRAY, JR.

VOLUME XVI.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. PLINY MERRICK.
HON. EBENEZER R. HOAR.
HON. REUBEN A. CHAPMAN.

ATTORNEY GENERAL.

HON. STEPHEN H. PHILLIPS.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF HAMPDEN, AT SPRINGFIELD, SEPTEMBER TERM 1860.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. PLINY MERRICK,
HON. EBENEZER R. HOAR, } JUSTICES.

COMMONWEALTH *vs.* ALEXANDER DESMARTEAU.

In this commonwealth, the technical definition of murder remains the same under *St.* 1858, *c.* 154, as the common law definition as previously recognized by the courts.

Under *St.* 1858, *c.* 154, murder committed with extreme atrocity or cruelty is murder in the first degree, although the atrocity or cruelty is not alleged or proved to have been premeditated.

Evidence that a man enticed a girl under eight years of age out of a house, and immediately ravished her, thereby inflicting severe wounds upon her person, and as a part of the same transaction, and for the purpose of concealing that crime and escaping punishment therefor, inflicted numerous severe blows upon her head and face and threw her into a river, and by these means caused her death, is sufficient evidence of murder committed with extreme atrocity and cruelty to warrant a jury in finding him guilty of murder in the first degree under *St.* 1858, *c.* 154, even if the only means of death alleged in the indictment are blows upon the head and face, and drowning.

On an indictment for murder, containing several counts in legal form, varying only in the statement of the means of death, if the jury find the defendant guilty of murder in the form set out in either count, they need not return a separate verdict on each count, but may find him guilty generally.

An indictment for murder by bruises and wounds of a person described throughout as

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Commonwealth v. Desmarteau.

Augustine, except in alleging that of said bruises and wounds "the said Augustine died," is not bad after verdict.

An indictment alleging murder in the same form as at common law will support a verdict of guilty of murder in the first degree under St. 1858, c. 154.

An indictment for murder, which, after describing the mode of the commission of the crime, introduces the legal conclusion by the words "and so the jurors" say, is not bad for argumentativeness.

An indictment for a murder at Chicopee is not bad for describing it at "Chickopee."

Interlineations in an indictment, and the use of the abbreviation "sd" for "said," are no ground for arresting judgment.

In an indictment for murder the person murdered may be described by the name by which he is commonly called and known, although differing from his name of baptism.

INDICTMENT for the murder of Augustine Lucas at Chicopee in this county, containing three counts, the second of which was as follows:

"And the jurors aforesaid on their oath aforesaid do further present that the said Alexander Desmarteau at Chickopee aforesaid in the county of Hampden aforesaid on the fifth day of November in the year eighteen hundred and fifty eight in and upon one Augustine Lucas of said Chickopee feloniously, wilfully and of his malice aforethought did make an assault, and that the said Alexander did then and there by some weapon and instrument to the jurors unknown the said Augustine upon the right side of the head and face and upon the forehead and nose and upon the left side of the head of her the said Augustine then and there feloniously, wilfully and of his malice aforethought did strike and beat, giving unto the sd Augustine then and there with sd weapon and instrument to the jurors unknown by the strokes aforesaid in the manner aforesaid in and upon the right side of the head and face and upon the forehead and nose and upon the left side of the head of her the sd Augustine divers deadly and mortal bruises and wounds of which said mortal bruises and wounds the said Augustina then and there instantly died. And so the jurors aforesaid upon their oath aforesaid do say that the said Alexander the said Augustine did then and there in manner and form aforesaid feloniously, wilfully and of his malice aforethought kill and murder against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

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The other counts were in similar form. The first charged that the murder was committed by casting, throwing and pushing the said Augustine into the Connecticut River, and so choking, suffocating and drowning her. The third alleged that the death was caused by the blows and drowning both. In the third count the wound was alleged to have been given "to the sd Augustine upon the head and face and forehead of her the sd Augustina;" and the name of the deceased was written "Augustine" throughout the residue of this count and the whole of the first count.

The defendant pleaded not guilty, and was tried at April term 1860 before *Dewey*, *Bigelow*, *Merrick* and *Hoar*, JJ., who allowed the following bill of exceptions:

"The defendant claimed upon the evidence that the murder, if committed by him, was not committed with deliberately premeditated malice aforethought; and requested the court to rule, that if the murder was not deliberately premeditated, the jury could not find the defendant guilty of murder in the first degree, although committed with extreme atrocity or cruelty. The defendant also contended that to constitute a murder in the first degree, by reason of its being committed 'with extreme atrocity or cruelty,' the atrocity and cruelty must be premeditated, and if not so premeditated, it would be only murder in the second degree.

"The court instructed the jury that the technical definition of murder in this commonwealth was the common law definition, as recognized by the courts of this commonwealth prior to the *St.* of 1858, *c.* 154; that the form of the indictment in a case of murder was the same, and no new allegations required in the same by reason of that statute; that by the statute the jury have a further duty to perform, viz. to find whether the case be murder in the first or second degree; that the case of murder in the first degree may be established in three different ways: 1. Murder committed with deliberately premeditated malice aforethought. 2. Murder committed in the commission of an attempt to commit any crime punishable with imprisonment for life. 3. Murder committed with extreme

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atrocity or cruelty; that these are so far independent provisions, that either of the three cases stated, if duly established by the evidence, would authorize the jury to return a verdict of murder in the first degree; that, as to the first, in the very language of the statute, it requires 'deliberately premeditated malice aforethought' to be proved, and the counsel for the defendant has correctly defined those words as requiring the act to be done with a formed design and premeditation before the act, and that to premeditate was to think of it beforehand: that the jury would take the rule of law, as to the first mode stated as above, as was stated by the counsel for the defendant; that as to the second mode, as under the circumstances of the present case it was not relied upon by the attorney general and the jury would not be required to pass upon it, no instructions were necessary; that as to the third mode stated, that of 'murder committed with extreme atrocity or cruelty,' it was relied upon by the counsel for the government, and would be a subject for their consideration; and they were instructed by the court, that if they were satisfied by the evidence that the deceased, a girl under eight years of age, was by the persuasions of the prisoner enticed from the house of Mrs. Burlin, at or about six o'clock on the evening of the 5th of November 1858, and the prisoner, having thus acquired the confidence of the child and the possession of her person, at once proceeded to perpetrate upon her person the crime of rape, actually ravishing her body by force, and thereby inflicting severe wounds upon the private parts of her body, and as a part of the same transaction and for the purpose of concealing this crime and escaping punishment therefor, proceeded further to inflict numerous severe blows upon her head and face, and then to throw her body into the Connecticut River, and by these means caused her death, it would be competent for the jury to find the prisoner guilty of murder committed with extreme atrocity and cruelty, and of murder in the first degree.

"The counsel for the prisoner asked that the jury might be instructed to render a verdict on the three counts in the indictment separately. But the court ruled that there being but one

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offence charged, though set forth in various counts adapted to meet the evidence, if the jury found the prisoner guilty of the murder in either of the counts set forth, they may find him guilty generally.

"It appeared by the evidence of the mother of the child, that the deceased was a French girl formerly living in New York, and that she was there baptized by the name of Augustine Alexandrine, and also that on some former period her name had been thus written in a book, to be kept by some of the family or their friends. The parents of the child had some time since separated, and the child had not of late been living with her mother. Various witnesses, including the members of the family where the child was living at the time of the alleged murder, testified to the fact, that since her residence in this commonwealth she had been always called and known by the name of Augustine only, and they never heard of her having any other name; and her mother, being recalled, stated that her child was baptized Augustine Alexandrine, but she was called and known only by the name of Augustine. The counsel for the prisoner insisted that there was a variance in the name of the deceased as stated in the indictment and shown by the evidence. Upon that point the jury were instructed that the name of the party alleged to have been killed must be truly and properly stated in the indictment; but it is sufficiently stated if the name by which the person has been commonly known and called by all those who have known her, or had occasion to call her name, is the same as that stated in the indictment; and that the mere fact that the deceased, while an infant, and resident of another state, was baptized by the name of Augustine Alexandrine, and that her name was thus entered on a family book, would not be fatal to the indictment, if the jury found the name set forth in the indictment corresponded with the name by which the deceased was generally known and called, agreeably to the rule above stated.

"The jury returned a verdict of guilty of murder in the first degree. The defendant excepts to the foregoing rulings and directions to the jury."

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The defendant also moved in arrest of judgment, for the following reasons: 1st. That murder in the first degree is in no way charged; 2d. That the defendant is charged with different murders and the murder of different persons; 3d. That it is not alleged that the different acts done by the defendant, as stated in the indictment and in its several counts, were perpetrated upon the same person; 4th. That it does not allege that the person upon whom the acts of violence were perpetrated was the same one that died; 5th. That the indictment is argumentative and bad; 6th. That the indictment is mutilated, interlined and altered; 7th. That the acts are not alleged to have been committed in any town of this commonwealth; 8th. That the indictment, taken together, is inconsistent, unintelligible, contradictory and insufficient.

G. M. Stearns, for the defendant. The *St.* of 1858, *c.* 154, established a new crime — murder in the first degree. "The words 'malice aforethought,' in the description of murder, do not imply deliberation." By *Shaw*, C. J., in *Commonwealth* v. *Webster*, 5 Cush. 306. The common law definition of murder is of murder in the second degree under the statute. Suppose the defendant had pleaded guilty, for what should he have been sentenced? [DEWEY, J. Must he not, if he pleads guilty, plead just what the jury should find?] The Gen. Sts. *c.* 112, § 8, only say, "if he pleads guilty," one justice may award sentence. [MERRICK, J. Does not a plea of guilty admit the offence to the whole extent charged?] Undoubtedly; but that leaves open, what is the offence charged? This court has no jurisdiction to try all murders, but only capital crimes; and if the indictment is for murder in the second degree, the court has no jurisdiction. Rev. Sts. *c.* 81, § 13. Gen. Sts. *c.* 112, § 5. By *St* 1858, *c.* 154, § 2, "murder not appearing to be in the first degree is murder in the second degree." This must appear by the indictment, which must be drawn, not merely according to the statute, but according to the Constitution, by which "no subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him." Declaration of Rights, art. 12.

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If murder in the first degree is charged at all in the indictment, the Commonwealth selected the ground of deliberately premeditated malice aforethought, and could resort to no other. *People v. White*, 24 Wend. 580. It was not competent for the jury, under the indictment, to find the defendant guilty of murder in the first degree, by reason of extreme atrocity or cruelty, as atrocity and cruelty are not alleged. The indictment negatives atrocity and cruelty, as it alleges that instant death was the result of the means used.

Murder committed with unintentional and unpremeditated atrocity or cruelty is not murder in the first degree. Under this branch of the statute, the killing with malice aforethought is not murder in the first degree, but the defendant must be guilty of something more; and that is wilful and intentional extreme atrocity or cruelty. 1 Russell on Crimes, 539.

The facts stated by the court did not make a case of murder committed with extreme atrocity or cruelty. It is not extremely cruel or atrocious, compared with usual means of murder, to perpetrate it by severe blows upon the head and face, and by then throwing the stricken person into a river. The fact that the rape was extremely atrocious and cruel does not operate to make the murder so, as the murder, according to the facts stated, was an afterthought, and was committed for the purpose of concealing an already perpetrated and completed atrocity. The court submitted to the jury for their consideration, as a cause of death, wounds upon the private parts of the deceased, when no such wound or cause of death was alleged in the indictment. If such wounds were not a cause of death and submitted to the jury as a cause of death, then the court should not have instructed the jury that these wounds might be considered upon the question of atrocious murder; for murder is the causing the death. If the wounds had nothing to do with the death, then they formed no part of an atrocious and cruel murder; if they in any degree contributed to it, then the verdict cannot be sustained upon an indictment which charges that the death resulted from causes unconnected with and uncontrolled by these wounds.

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The defendant had a right to have the jury required to agree upon each count, and not merely to agree to the fact of the murder without an agreement upon the cause. *Parrot* v. *Thacher*, 9 Pick. 426

The indictment should describe the deceased by her true name, or by the name by which she was commonly known. It purports to set out the former, and the name alleged must be proved to be the deceased's real name. The true name of a person is that name by which such person is baptized in infancy. 1 Russell on Crimes, 555. 1 Greenl. Ev. § 65. 3 Greenl. Ev. § 22.

The indictment is bad in arrest of judgment, for the reasons assigned. 1st. It does not charge murder in the first degree, as already argued. 2d. It alleges two persons, Augustine and Augustina, to have died from the violence of the defendant; and as the jury have found a general verdict, there is nothing to show which of these two he is to be sentenced for murdering. 3d. There is nothing to show that the same person is spoken of throughout, for the letters "sd" have no signification. 4th. It alleges that Augustine received the blow and that Augustina died. 5th. It alleges certain facts, and then proceeds, "and so the jurors do say that the defendant did kill and murder," as a conclusion from those facts. *Commonwealth* v. *Whitney*, 5 Gray, 85. *Dias* v. *State*, 7 Blackf. 20. 6th. There is no such town as Chickopee. 7th. An indictment cannot be changed or altered without the consent of the grand inquest, and that consent should appear. 2 Archb. Crim. Pl. (Waterman's ed.) 212 – 214, notes. 8th. The indictment is therefore contradictory and insufficient.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Dewey J. The provisions of the *St.* of 1858, *c.* 154, have materially affected the course of proceedings in the case of a trial of a party charged with the crime of murder. Although the form of the indictment in such cases remains as heretofore adopted and sanctioned in this commonwealth, yet the punishment for the crime of murder is made to depend upon the finding of the jury whether it is murder in the first or second

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degree, and the jury are by the statute required to find the degree of murder. Murder in the first degree is declared by this statute to be a "murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty." The court, upon the trial of the present case, properly instructed the jury that the technical definition of murder in this commonwealth was the common law definition of murder as recognized by the court prior to the St. of 1858, c. 154, and that under this form of indictment the jury are by their verdict, if they find the prisoner guilty, to find also the degree of murder. The first degree embraces the cases stated above, and they constitute three distinct classes, either of which, if proved, constitutes murder in the first degree.

As to the second of these classes, although not material to the present case, it may be proper to remark that an obvious error has occurred in the words "in the commission of an attempt to commit any crime punishable with death or imprisonment for life," in substituting "an" for "or," and thus excluding the case of a murder committed in the actual commission of a crime punishable with death or imprisonment for life, and confining it to the case of murder committed in an attempt to commit such crime. Upon recurring to the form of a law proposed by the commissioners on the penal code, reported to the legislature in 1844, from which the St. of 1858, c. 54, was apparently copied, this error will at once be perceived, and it has since the trial in the present case been corrected by the Gen. Sts. c. 160, § 1.

As to the case of murder committed "with deliberately premeditated malice aforethought," the instructions given to the jury are not made the subject of any exception. The sole inquiry upon this branch of the case, is of the correctness of the instructions as to what constitutes a murder "committed with extreme atrocity or cruelty." The counsel for the prisoner contended that to constitute a murder in the first degree, by reason of its being committed with extreme atrocity or cruelty,

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the atrocity and cruelty must be premeditated. In the opinion of the court, this position cannot be maintained. The three different cases stated as authorizing a conviction of murder in the first degree are so far independent, that the existence of either would authorize the jury to return a verdict of murder in the first degree. The statute has made extreme atrocity or cruelty in the commission of the murder sufficient to constitute the crime of murder in the first degree; and if this be shown, it is not incumbent on the government affirmatively to show that such atrocity and cruelty were premeditated.

In the present case, the instruction to the jury, that "if they were satisfied by the evidence that the deceased, a girl under eight years of age, was by the persuasions of the prisoner enticed from the house of Mrs. Burlin, at or about six o'clock on the evening of the 5th of November 1858, and the prisoner, having thus acquired the confidence of the child and the possession of her person, at once proceeded to perpetrate upon her person the crime of rape, actually ravishing her body by force, and thereby inflicting severe wounds upon the private parts of her body, and as a part of the same transaction and for the purpose of concealing this crime and escaping punishment therefor, proceeded further to inflict numerous severe blows upon her head and face, and then to throw her body into the Connecticut River, and by these means caused her death, it would be competent for them to find the prisoner guilty of murder committed with extreme atrocity and cruelty, and of murder in the first degree," was in the opinion of the court most fully authorized, these facts showing a case of murder committed with extreme atrocity and cruelty. In this third class it is the barbarity and atrocity which attend such murder, that increase the guilt of the party, and that call for the highest degree of punishment known to our law. The mere recital of the facts that make up the history of this homicide, it would seem, should silence every doubt of its being a case of most aggravated atrocity and cruelty. It is further to be remembered that the instruction to the jury upon this point was merely the legal instruction that it would be competent for the jury to find a

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verdict of guilty of murder in the first degree upon proof of such facts as were stated. It left the matter wholly to the jury so to find, or not to find, only ruling as to the competency of such evidence to establish the atrocity and extreme cruelty prescribed in the statute.

It is upon the present hearing objected, that many of the facts stated as subjects for the consideration of the jury, as bearing upon this point, were not stated in the indictment. We are of opinion that they need not be. Such facts may not have been the cause of death, and yet they may materially have contributed to make the killing one of atrocity and extreme cruelty.

The counsel for the prisoner asked that the jury might be instructed to render a verdict on the three counts separately. These counts charge the offence in different forms as to the mode of perpetrating the same. 1st. That the death was caused by throwing the deceased into the Connecticut River, whereby she was suffocated and drowned. 2d. That the murder was committed by an assault with some weapon and instrument unknown. 3d. That the murder was committed by an assault with a weapon and instrument unknown, and by throwing the deceased into the Connecticut River, by which wounds and casting into the Connecticut River she came to her death.

There being but one offence charged, though set forth in various counts, adapted to meet the evidence, the jury were properly instructed that if they found the prisoner guilty of the murder as set forth in either of the counts, they might return a verdict of guilty, generally. Under this instruction, the jury have, by a general verdict of guilty, found the prisoner guilty of murder as set forth in some one of the counts at least; for it was only upon such finding that the general verdict of guilty, under the ruling of the court, could be rendered. It is important and perhaps material to the consideration of the present question that each and every one of these counts is in technical form, aptly drawn, and sets forth fully all that is necessary to constitute a charge of murder, and to authorize a judgment and sentence therefor. Had a verdict been rendered in form on either of these counts, no objection could have been taken to a judgment and sentence

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thereon. A separate verdict on each of these counts, assuming that verdict to have been guilty upon one of them, and not guilty upon the others, would have presented the case, as regards the judgment and sentence thereupon, precisely as it now stands. A conviction upon one is equally fatal to the prisoner as upon all, it being shown that each count is good and sufficient in itself, and would authorize a judgment and sentence thereupon.

This practice of rendering a general verdict of guilty, without distinguishing between the particular counts in the indictment, where they charge only a single offence, and various counts are introduced to meet more accurately the precise circumstances of the transaction, has certainly been very general, and usually adopted in capital trials in this court.

In the well known case of *Commonwealth* v. *Webster*, 5 Cush. 295, in which the defendant was charged with the murder of Dr. Parkman, there were four counts, charging the offence to have been perpetrated in different modes. One of the counts was of the most general character, charging the crime to have been perpetrated "in some way and manner, and by some means, instruments and weapons, to the jurors unknown." The other counts varied thus: One charging a mortal wound by stabbing with a knife; another by a blow on the head with a hammer; and a third by striking, kicking, beating and throwing on the ground. Yet upon these a general verdict was rendered. It is true that no direct motion was made, as in the present case, by the counsel for the prisoner, that the jury be directed to render a separate verdict as to each count. But from the well known ability of the counsel in that case, it must be assumed that such a motion would have been made if, in their opinion, the law would have sustained it. The necessity for resorting to these various and somewhat inconsistent forms of alleging the mode in which the death was caused, is well stated by the late chief justice in *Webster's case;* and the reason for their being introduced equally requires and justifies a general verdict upon all such as are legally formal. In reference to such counts, it was there said by the court: "Take the instance of a murder at

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sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined." In the case supposed, it would be as impracticable for the jury of trials to find upon the evidence which actually caused the death, as it would be for the grand jury who presented the indictment. The form of this indictment, and the reasons for it, are strikingly like the case above supposed.

In the case of *Commonwealth* v. *Dominic Daley & James Halligan*, for the murder of Marcus Lyon, tried in the county of Hampshire in the year 1806, I find the indictment to have been thus: The first count charged that Daley with a pistol gave Lyon the blow, of which he instantly died, and that Halligan was present, aiding and abetting; the second count alleged that Daley gave the blow as aforesaid, and immersed the body in Chicopee River, so that Lyon died as well by reason of the immersion as the blow, and that Halligan was present aiding and abetting; the third alleged that Daley and Halligan each with a pistol in his hand gave the mortal wounds and bruises of which Lyon instantly died. These counts differed, as will be perceived, as much as those in the case at bar; but a general verdict of guilty was rendered, the prisoners sentenced thereon, and the sentences executed upon them.

We may refer to some English cases illustrative of this point. In *Regina* v. *O'Brian*, 1 Denison, 9, where in one count A. B. was indicted for the murder of J. N. by a blow of a stick, and C. D. and E. F. were charged as aiding and abetting; and in a second count it was alleged that C. D. perpetrated the murder by throwing a stone, and A. B. and E. F. were charged as being present aiding and abetting; and a general verdict was given; it was objected to, as it left it uncertain whether the stick or the stone caused the death; but the judges held the conviction good, saying, "the mode of death in both counts being

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substantially the same." In *Regina* v. *Downing*, 1 Denison, 52, where two were indicted for murder; A. in the first count being indicted as principal in the first degree, and B. as being present aiding and abetting; and in the second count B. was indicted as principal in the first degree, and A. as being present aiding and abetting; and the jury found them guilty, but said that they were not satisfied as to which of them actually committed the murder; (that is, whether the mode of causing the death was properly set forth in the first or in the second count;) the judges held that the jury were not bound to find the defendants guilty on one particular count, but might render a verdict of guilty on both. It is true, in reference to the case last cited, that the law makes no difference between the offence of principal in the first degree or principal in the second degree. Archb. Crim. Pl. (5th Amer. ed.) 12. But the case is an authority that the verdict of guilty need not be confined to one count, although only one offence is intended to be charged or offered to be proved. See also *United States* v. *Pirates*, 5 Wheat. 201.

It seems to us, in a case like the present, where all the counts are in proper legal form and relate to a single offence, and a conviction on any one requires the same judgment and the same sentence as a conviction on all would, that, if the jury find the prisoner guilty of murder in the form set forth in either of the counts, they may find him guilty generally.

On the part of the defendant, it is denied that each of these counts is in proper legal form, and would be unobjectionable upon a motion in arrest, or upon a writ of error in case such count had been the single count upon which the jury had returned a verdict of guilty. The count most strongly objected to is the second, where it is alleged "of which said mortal bruises and wounds the said Augustina then and there instantly died." In the preceding part of this count, the name of the party alleged to have been killed is written "Augustine," and it is contended that this is a variance, and that the party alleged to have died of said mortal bruises and wounds is other and different from the party described in the previous parts of this count, and upon whom the assault is alleged to have been made. That

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the meaning, to any other than a technical mind seeking for discrepancies, would be entirely obvious, no one can doubt. The deadly and mortal bruises are alleged to have been inflicted on Augustine, and it is alleged "that of the said mortal bruises and wounds the said Augustina died." But upon giving to the prisoner the full benefit, as he has a right to have the full benefit, of any variance, if such exists, we are not satisfied that such variance exists. There is not a fatal variance here. The names, as written, only differ in the final letter, substituting "a" for "e." This does not necessarily change the sound of the name; it may still be *idem sonans;* you may read them as different in sound, by dividing the first into three syllables, and the other into four, or both may be pronounced alike. In the manner they are found stated in this indictment, they are legally and properly to be taken as describing the same person. In *Regina* v. *Wilson*, 1 Denison, 284, the name as set forth was John McNicole, when the true name was John McNicoll, and it was held no variance, the court saying the use of the letter "e" for "l" did not make a different name. The same mode of describing the name as Augustina in the third count also, for the above reason, would not be fatal; but in this it might also be rejected as surplusage, and the count be good and sufficient.

The objection in arrest of judgment, upon the ground that murder in the first degree is not technically charged in the indictment, there being no allegation of the act required by the statute to constitute that offence, is not tenable. The answer to this is that the crime charged in this indictment is murder as known and defined by the common law. That offence is here technically charged. The statute provision has only reference to the extent of the punishment, and for that purpose the jury are required to find the degree. This question is not now for the first time before the court. In connection with other questions raised in the case of *Commonwealth* v. *Gardner*, 11 Gray 438, it was directly held by this court that this form of indictment was sufficient, the court in the opinion in that case saying: "It seems to us to have been the clear intent of the legislature,

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that the form of an indictment for murder should remain as it had been." "The legislature manifestly consider murder as one kind or species of crime, the punishment of which may be more or less severe, according to certain aggravating circumstances, which may appear on the trial." It was also held that such form of indictment in the case of murder, without distinguishing in the indictment the character of the offence as of the first or the second degree of murder, was not inconsistent with the twelfth article of the Declaration of Rights. This form of indictment has the direct authority of the legislature in the act creating the distinction between the two degrees of murder. It has the sanction of this court upon full argument, and must be held as now settled law for this commonwealth.

It was further objected that the counts in the indictment charge the killing and murder only argumentatively, by alleging "and so did kill and murder." But this will be found to be in accordance with approved forms, and to have been properly used.

Nor does any ground exist for arresting the judgment for the misspelling of the name of the town of Chicopee, by adding "k" to the first syllable. It is clearly a name *idem sonans*.

As to the minor objections suggested, that of the use of the abbreviation "sd," and several interlineations in the indictment, however they might have furnished a proper ground for a motion to the discretion of the court for quashing the indictment, had a motion to that effect been made before the party had pleaded, or perhaps before he was put on his trial, they furnish no sufficient ground for arresting judgment after a trial and verdict against the prisoner. It is unnecessary perhaps to add that such imperfections are objectionable and to be avoided, and more especially so in indictments for offences of this grade.

In presenting these views upon the case upon the exceptions, we are not to be understood as calling in question the general rule, well known and practised upon, that when there are several counts in an indictment, and a general verdict is taken without objection, upon a motion in arrest, or writ of error, if there be one good count, judgment may be entered upon that. Here the counsel for the defendant objected at the trial to such

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general verdict; and as the operation of the rule we have referred to would prevent his taking at a later stage the objection that some of the counts were not good, it has seemed to require us to find all the counts good to sustain this ruling.

The objection relied upon to sustaining this verdict upon the ground of variance between the name of the person alleged to have been murdered, and that shown by the evidence, is wholly untenable. If the name by which the party is usually called and known be stated in the indictment, it is sufficient. The instructions were to this effect, and the jury have found no variance. Upon this point the authorities are quite uniform, and are founded in reason and good sense. In a case of larceny, in which the indictment alleged the stealing of the goods of Mary Johnson, and the evidence was that the original name of the party was Mary Davis, but that she had been called and known by the name of Mary Johnson for the last five years, the court held that there was no misdescription, and the indictment might be maintained. *Rex* v. *Norton*, Russ. & Ry. 510. In another case, where the party was indicted for stealing the goods of Richard Pratt, and it appeared that his name was Richard Jeremiah Pratt, but it was shown that he was equally well known by the name of Richard Pratt, it was held to be no case of variance, and the indictment was sustained. *Rex* v. ——, 6 Car. & P. 408. See also Rosc. Crim. Ev. (2d. ed.) 78.

Upon the whole matter we find no ground to sustain any objections presented by the bill of exceptions, or by the motion in arrest of judgment, although they have been very ably and ingeniously presented for our consideration by the counsel for the prisoner. The result is therefore that the exceptions taken by the prisoner to the rulings of the court upon the trial, as well as the motion in arrest of judgment, be overruled.

Exceptions and motion in arrest overruled.

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COMMONWEALTH *vs.* MICHAEL DONOVAN.

An indictment on *St.* 1855, *c.* 405, which alleges that the defendant at a certain time and place kept and maintained "a certain building, place and tenement, to wit, a room in a dwelling-house," used for the purposes prohibited by that statute, "whereby, and by force of the statute in such case made and provided, the said building, place and tenement, then and there kept and maintained by the defendant and then and there used as aforesaid was then and there a common nuisance," sufficiently alleges the place where the building was situated, and that the room was a common nuisance.

INDICTMENT on *St.* 1855, *c.* 405, alleging that the defendant at Springfield on certain days "did keep and maintain a certain building, place and tenement, to wit, a room in a dwelling-house, used as a house of ill-fame, resorted to for prostitution and lewdness, and for illegal gaming, and used for the illegal sale and illegal keeping of intoxicating liquors; whereby, and by force of the statute in such case made and provided, the said building, place and tenement then and there kept and maintained by the said William Donovan, and then and there used and resorted to as aforesaid, was then and there a common nuisance."

The defendant, being convicted in the superior court, moved in arrest of judgment, because the indictment did not allege the place where the building was, but only the place where the defendant kept and maintained the building; because it was argumentative; and because it alleged that the building, place and tenement were a common nuisance, while it only alleged that a room had been kept, maintained and used for the purposes set out. *Vose*, J. overruled the motion, and the defendant alleged exceptions.

G. M. Stearns, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

MERRICK, J. The indictment does not vary from the forms which have been approved and often adopted in setting forth offences of a similar character, and contains a statement of all the facts which are necessary to show that the particular offence charged against the defendant has been committed in the place where he kept the tenement. Archb. Crim. Pl. (10th ed.) 636,

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637. *Commonwealth* v. *Hill*, 14 Gray, 24. A part of the building may be used in such manner as to make it a nuisance, without affecting the legal character of the other part. It is therefore sufficient to allege and prove that that part has been kept for such purposes as the statute has prohibited and made illegal. *Commonwealth* v. *Shattuck*, 14 Gray, 23.

Exceptions overruled.

COMMONWEALTH *vs.* MICHAEL HIGGINS.

Upon the trial of an indictment for maintaining a building used for the illegal keeping and illegal sale of intoxicating liquors, the Commonwealth, after introducing evidence that a room occupied by the defendant was fitted with the common appliances for the sale of liquors, and that persons drank ale there, may prove that persons have been seen on the defendant's premises and leaving them in a state of intoxication.

Proof that the defendant maintained a building used for the illegal keeping and illegal sale of intoxicating liquors, for any substantial period of time, if only one day, will support an indictment for maintaining it during a year.

INDICTMENT on *St.* 1855, *c.* 405, for a common nuisance by maintaining a room used for the illegal sale and illegal keeping of intoxicating liquors.

At the trial in the superior court before *Vose*, J., there was evidence tending to show that the defendant kept and occupied a room containing a bar, show-case, oyster-stand, with jugs and bottles containing liquor, and tumblers, drainer, toddy-stick and a barrel of ale, and that persons drank ale there. The judge, against the defendant's objection, allowed a witness to testify that on one occasion he saw a woman intoxicated on the defendant's premises, and that he had occasionally seen people going away from the premises intoxicated.

The defendant asked the judge to instruct the jury that they must be satisfied that, during a considerable portion of the period of time alleged in the indictment, the defendant kept and maintained the premises in the manner alleged in the indictment, and that so keeping and maintaining them for one day would not be sufficient. The judge declined so to instruct

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the jury; and instructed them that they must be satisfied that the room was appropriated and devoted to the illegal sale and keeping of intoxicating liquor; not that this was the exclusive business done in the room, but that the illegal sale or keeping of liquor was among its ordinary and principal uses; and, upon the question how long such use must continue to constitute the offence charged, that no particular length of time was necessary; that if the defendant kept and maintained and used a building or place for the illegal sale of liquor for any substantial period of time, he would be liable; that so keeping and using such a building for a week, or even for one day, would constitute a violation of the statute on which this indictment was founded. The defendant, being convicted, alleged exceptions.

E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Metcalf, J. 1. The testimony was rightly admitted. *Commonwealth* v. *Burnham*, 14 Gray, 101.

2. The jury were correctly instructed that the defendant violated the statute on which the indictment was founded, by keeping, maintaining and using the saloon, for a single day only, for the illegal sale of liquor. *Wells* v. *Commonwealth*, 12 Gray, 326.

Exceptions overruled.

Commonwealth *vs.* Cornelius C. Maloney.

Under an indictment for being a common seller of intoxicating liquors, evidence may be introduced that persons were frequently seen to go in and out of the defendant's shop at all hours of the day and evening; that some of them carried in and out jugs and demijohns and gin and beer barrels; and that the defendant's name was on the shop.

The allegation of time in an indictment for a single sale of intoxicating liquors need not be proved as laid, although the indictment contains a count for being a common seller.

Evidence of unlawful sales of intoxicating liquors under such circumstances as would support an indictment for a nuisance under *St.* 1855, *c.* 405, is admissible in support of an indictment for the single sales under *St.* 1855, *c.* 215.

If the evidence offered at the trial is sufficient to support the allegations in the indictment, the presumption is that the offence proved is that charged; and an immaterial variance in time will not authorize the jury to find them not to be same.

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INDICTMENT on St. 1855, c. 215, for being a common seller of intoxicating liquors from the 1st of December 1859 to the 21st of May 1860; with a second and third counts for single sales to Chauncey R. Shaw on the 3d of January and the 1st of February 1860. At the trial in the superior court before *Vose*, J., the Commonwealth offered much evidence tending to prove that the defendant kept a shop, and that in said shop was kept a large quantity of various kinds of liquors, and that a pump, and liquor measures; and large numbers of casks were seen there at different times. And the judge, against the defendant's objection, allowed a witness to testify that during the period named in the first count he had frequently seen people go in and out of the defendant's shop, at all hours of the day and evening, and carry in and out jugs and demijohns, and gin and beer barrels; and that the defendant's name was on the shop.

The district attorney proposed to prove by Shaw that he had purchased liquor of the defendant prior to the 1st of December 1860, for the purpose of sustaining the second and third counts. The defendant objected to any such evidence, and to any proof of sales made by the defendant prior to that time; but the judge overruled the objection, and Shaw testified to purchasing liquor of the defendant twice during the summer and fall of 1859. After the defendant's counsel had closed his argument, the district attorney, without objection, entered a *nolle prosequi* on the first count. In charging the jury, the judge instructed them, under objection from the defendant, that the district attorney having abandoned the first count, charging the defendant with being a common seller, the prosecution was to be regarded as one for single sales alone, and that they might convict the defendant on the second and third counts, if they were satisfied that he had made two specific and distinct sales to Shaw at any time since the liquor law took effect in 1855.

Before the Commonwealth introduced any evidence, the defendant objected to the proof of such facts as would be competent to establish the guilt of the defendant for maintaining a common nuisance under the St. of 1855, c. 405, by having used certain premises for the illegal sale and keeping of intoxicating

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liquors; but the judge ruled that the government might prove such facts, although the evidence might also show that the defendant had been guilty of a violation of the nuisance act. The defendant contended that if the evidence on the part of the government proved any offence, it was under the *St.* of 1855, *c.* 405, and that therefore this indictment could not be sustained; but the judge declined so to rule, and instructed the jury that they would be authorized to convict the defendant if they were satisfied that the allegations in the second and third counts of the indictment, or either of them, were proved.

The defendant contended that the grand jury did not indict the defendant for the two above named sales to Shaw. The court instructed the jury that if they were satisfied that the defendant made two specific sales to Shaw in the summer and fall of 1859, and that there was no evidence that any other sales were made by the defendant to Shaw, and that Shaw was a witness before the grand jury, the jury would be authorized in presuming that the grand jury intended to charge the defendant with the sales testified to by Shaw, though stated in the indictment to have been made at a different time from that stated by Shaw. The defendant requested the court to instruct the jury that though they would be authorized, if they were satisfied of the foregoing facts, to find that the grand jury intended to charge the defendant with said sales, it would be competent for them to find that the grand jury did not so intend. But the court declined so to instruct the jury, or to instruct them otherwise than as above stated.

The defendant was convicted, and alleged exceptions.

E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Hoar, J. 1. The circumstantial evidence as to the occupation of the defendant's shop, and the manner of conducting business there, was clearly admissible in connection with other evidence, under the count in the indictment, charging him with being a common seller. *Commonwealth* v. *Tubbs*, 1 Cush. 2 But as upon that count a *nolle prosequi* was subsequently entered, its admission became immaterial.

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2. The allegation of time in an indictment for a single sale of intoxicating liquors is not material and need not be proved as laid; and this rule is not affected by the fact that the indictment also includes a count against the defendant as a common seller.

3. It is no objection against the conviction of the defendant for two distinct sales, to show, under an indictment in which that offence is properly set forth, that the sales were made under such circumstances as would have made them evidence under an indictment for a nuisance. *Commonwealth* v. *Bubser*, 14 Gray, 83. *Commonwealth* v. *Hudson*, 14 Gray, 11.

4. If the evidence offered is sufficient to support the allegations in the indictment, the presumption is that the offences proved are the same as those charged in the indictment; and it would not be competent for the jury to find them not to be the same, upon no other evidence than the fact that the time proved did not correspond with that averred, the variance being immaterial. *Commonwealth* v. *Burke*, 14 Gray, 81.

Exceptions overruled.

COMMONWEALTH *vs.* PATRICK WHALEN.

Evidence that a room in the defendant's dwelling-house was fitted up with a bar and shelves on which were decanters, glasses and other articles used in the mixing and retail of ardent spirits, and that there were casks containing liquors of various kinds in an adjoining cellar, is competent evidence to support an indictment for being a common seller of intoxicating liquors.

On the trial of an indictment for being a common seller of intoxicating liquors, no exception lies to an instruction that if the jury are satisfied upon the whole evidence that the defendant has unlawfully made three single sales of intoxicating liquors, they are authorized to find him guilty; or to a refusal to instruct them that it is incumbent on the Commonwealth to prove each of such sales as independent transactions by the same evidence, and as fully and satisfactorily, as if each had been charged as a separate sale.

INDICTMENT for being a common seller of intoxicating liquors. At the trial in the superior court before *Vose*, J., there was testimony tending to prove that a room on the first floor of the defendant's dwelling-house was fitted up with a bar and shelves,

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on which were decanters, glasses and other articles used in the mixing and retail of ardent spirits, and that in an adjoining cellar were casks containing liquors of various kinds; and that sales were made at least three separate times of intoxicating liquors in these rooms within the period covered by the indictment.

Upon this evidence the defendant asked the court to instruct the jury that in order to be justified in finding the defendant guilty on the ground of proof of three separate and distinct sales, it was incumbent on the Commonwealth to prove each of such sales as independent transactions by the same evidence, and as fully and satisfactorily, as if each of them had been specifically set forth in the indictment in separate counts. The court declined so to rule; and instructed the jury that it was not necessary that the Commonwealth should prove, in support of the count charging the defendant with being a common seller, three specific sales; that they must be satisfied that the defendant was engaged in the business of illegally selling intoxicating liquors during the period named in the indictment, or some part of it, and to the extent of having made three sales; and that if they were satisfied, upon the whole evidence, that the defendant had unlawfully made three single sales, during that period, they were authorized to find a verdict of guilty. The defendant was convicted, and alleged exceptions.

G. Ashmun & E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth

Merrick, J. The evidence respecting the manner in which the defendant's house was fitted up with a bar, and furnished with decanters, glasses and other articles used in mixing and in the retail of ardent spirits, as well as the fact that in an adjoining cellar were casks containing various kinds of liquors, was properly admitted. It had a tendency to show the character and sort of business in which he was engaged, and thus to prove the allegations set forth in the indictment.

The instructions as to the evidence upon which it would be competent for the jury to convict the defendant, are not subject to any valid exception. It is conceded by his counsel that no

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objection could justly be urged against the charge of the court in relation to the general course of proceeding by which the defendant might be proved to have been a common seller during the time specified in the indictment. But it is insisted that the court should have adopted the request to instruct the jury that in order to be justified in finding him guilty on the ground that he had made three separate and distinct sales, it was incumbent on the Commonwealth to prove each of such sales as independent transactions by the same evidence, and as fully and satisfactorily, as if each of them had been specifically set forth in the indictment in separate counts. This particular request was not complied with; but the instruction actually given, namely, that if the jury were satisfied upon the whole evidence that the defendant had unlawfully made three single sales, they were authorized to find a verdict of guilty, was fully equivalent to it, because such unlawful single sales could only be proved in the same manner and by the same evidence which would be required if they had been or were the precise and specific subjects of accusation. *Exceptions overruled*

COMMONWEALTH *vs.* MRS. PATRICK WHALEN.

A wife who, in pursuance of a contract made by her husband for the illegal sale of intoxicating liquors, delivers the same to the purchaser in his absence, may be punished for it under *St.* 1855, *c.* 215, § 17.

Upon the return into court of a jury which had been charged with an indictment on *St.* 1855, *c.* 215, for the unlawful sale of intoxicating liquors, the foreman informed the court that there was no prospect of an agreement, and that there was but one juror who refused to agree, and asked the court whether a juror had a right to set aside the provisions of the statute against the sale of ale because the city government had permitted persons to sell it. The court instructed the jury that they could not disregard any of the provisions of the statute, which made illegal not only the sale of ardent spirits but also of ale; that both the rights of the defendant and the interest of the public required that these cases should be terminated; and that, while no juror should render a verdict against his convictions, it was a fact for any dissenting juror's consideration that the rest of the panel differed from him. *Held*, that the defendant had no ground of exception.

INDICTMENT against "Mrs. Patrick Whalen" as a common seller of intoxicating liquors. Trial and conviction in the

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superior court before *Vose*, J., who signed this bill of exceptions:

"The same questions are reserved in this case as are set forth in the bill of exceptions in the case against Patrick Whalen.

"To prove a sale of intoxicating liquor, a witness for the Commonwealth testified that he had several times drank liquor in the room described, which was delivered to him by Mrs. Whalen, but he had never paid her for it; that he got it in pursuance of an arrangement or understanding between the witness and Patrick Whalen, the defendant's husband, that the witness might obtain liquor whenever he might want it, and they would settle at a subsequent time; and that he told the defendant he would make it right with her.

"The defendant's counsel contended that this tended to prove a sale by the husband and not by the wife, and that if she only delivered the liquor in execution of the contract of the husband, she was not liable. But the court instructed the jury that if they believed that the liquor was in fact delivered by the wife, and that it was the intention or understanding of the parties at the time of delivery that the witness should pay either Whalen or his wife, in pursuance of the foregoing arrangement with the husband, although the agreement for sale was made with the husband alone, she would be liable under the statute, as the agent of the husband.

"There was evidence from some of the witnesses of sales at different times of what the witnesses called beer or ale; but none of the witnesses could say whether it was in fact ale, strong beer or small beer.

"After the jury had been out several hours, they came into court, and in reply to an inquiry by the court, the foreman said there was no prospect of an agreement; that there was but one juror who refused to agree; and the foreman asked the court whether a juror had a right to set aside the provisions of the statute against the sale of ale because the city government had permitted persons to sell it.

"The court instructed the jury that they could not disregard any of the provisions of the law which made illegal not only the

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sale of ardent spirits, but also of ale, strong beer, lager beer, cider and wine.

"The court further instructed the jury that it was very desirable that these cases should be terminated; that both the rights of the defendant and the public interest required it; and that, while no juror should render a verdict against his convictions, it was a fact for any dissenting juror's consideration that the rest of the panel differed from him.

"To the foregoing rulings and instructions the defendant excepts."

G. Ashmun & E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Hoar, J. The defendant, who is the wife of Patrick Whalen, is indicted by a somewhat novel mode of designation; but as she has made no objection to it, we have no occasion to consider its propriety.

The exceptions taken by her, which were similar to those taken on the trial of the indictment against her husband, have been settled by the decision in *Commonwealth* v. *Whalen*, *ante*, 23.

The first exception peculiar to this case is, that she could not be found guilty of selling intoxicating liquor, upon proof of a delivery by her, in pursuance of a contract of sale made by her husband. But a delivery is an essential part of a sale; and if, as the instruction of the court assumed, the jury were satisfied that she acted as the agent of her husband in what she knew to be an illegal sale, by making the delivery of the thing sold in his absence, this constituted a sufficient participation in the misdemeanor to render her responsible for it under the statute. St. 1855, *c.* 215, § 17. *Commonwealth* v. *Murphy*, 2 Gray, 510.

The remarks made by the presiding judge to the jury were unobjectionable. It was certainly proper for the court to instruct the jury that they were not at liberty to disregard any provision of law applicable to the case before them. Nor is it a questionable proposition that it is important to defendants and to the community that public prosecutions should be terminated. *Interest reipublicæ ut sit finis litium.* The defendant

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would not contend that any juror should find a verdict against his own convictions; and where twelve men are to agree upon a verdict if they can, the fact that one of them does not agree with the rest, and that the others differ from him, is a fact which he can hardly fail to consider, if unanimity is to be obtained by conferring together, and not by the separate assertion of the original opinion of each, without reference to the views of the rest. *Commonwealth* v. *Tuey*, 8 Cush. 1.

But the objection which has been pressed upon our attention in the argument is not chiefly an objection to the doctrines stated by the presiding judge at the trial, as abstract propositions. The defendant contends that she was deprived of a fair trial, by an independent jury, because, under the circumstances which occurred at the trial, the conversation between the court and the jury must have had an undue influence upon one of the panel. If this appeared to be so, it would have been a good ground for a motion for a new trial. But we do not think that we can reasonably come to any such conclusion. If the same remarks had been made in the original charge to the jury, they would have been not only lawful, but highly appropriate. And although we think it was not expedient for the jury to make any communication to the court as to the opinion of a particular juror, or to intimate how they were divided in opinion, yet we do not see that, in this case, the statements were not made with the consent of all the jurors, or that there was any such misconduct of the jury as required the case to be taken from them without a verdict. No motion or application was made to the court to discharge the jury, or to give any further direction to them than was given. The rulings and instructions to which exceptions were taken were correct in matter of law, and we cannot perceive that injustice has been done to the defendant.

Exceptions overruled.

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COMMONWEALTH *vs.* LYDIA A. COLLINS.

Exceptions cannot be sustained to the admission in evidence of the declarations of a defendant charged with unlawfully selling intoxicating liquors, that he owned the land, leased the building, and kept the establishment in which it is contended that he committed the offence, if the bill of exceptions does not show whether there was or was not other testimony tending to connect him with the acts charged.

INDICTMENT on *St.* 1855, *c.* 215, for being a common seller and for unlawful single sales of intoxicating liquors. Trial and conviction in the superior court, before *Vose*, J., who signed this bill of exceptions:

"The district attorney called Otis Childs as a witness, and asked him if he ever had any conversation with the defendant relative to her keeping a building on Railroad Street, in Springfield, being the place where the government contended that she had committed the offence charged in the indictment. The defendant objected to the question; but the court allowed it to be put; and the witness testified that he did have such a conversation, and that the defendant stated that she owned the building and leased the land on which it stood, and that she kept the establishment. To the foregoing ruling the defendant excepts."

E. W. Bond, for the defendant, cited *Commonwealth* v. *Madden*, 1 Gray, 486; *Commonwealth* v. *Putnam*, 4 Gray, 16; *Commonwealth* v. *Page*, 6 Gray, 361; *Commonwealth* v. *Gardner*, 7 Gray, 494.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J. These exceptions are so framed that we cannot judge, from them alone, whether the testimony of Childs was rightly or wrongly admitted; and this is a decisive reason for overruling them. We are bound to presume that the state of the other evidence, which is not reported, rendered that testimony admissible. *Parmenter* v. *Coburn*, 6 Gray, 510. *Oliver* v. *Phelps*, 1 Zabr. 612. We must presume that there was evidence, previously or subsequently adduced, tending to connect the defendant, more or less closely, with the acts for which she

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was indicted. And if there was evidence that those acts were done in the building which she told Childs that she owned and kept, then his testimony was competent, and therefore admissible, for the purpose of showing that those acts, even though done by the hands of others, were in law her acts, and that she was legally punishable for them. The weight of the testimony was to be judged of by the jury. *Exceptions overruled.*

COMMONWEALTH *vs.* BARRETT O. NORTON.

Upon the trial of an indictment for being a common seller of intoxicating liquors, testimony that the defendant kept a bar, and was the proprietor of a public house, is competent in connection with evidence tending to show that intoxicating liquors were sold on the premises.

INDICTMENT on *St.* 1855, *c.* 215, for being a common seller and for unlawful single sales of intoxicating liquors.

At the trial in the superior court, *Vose*, J., against the defendant's objection, allowed the district attorney to put the following questions to a witness: "Does the defendant keep a bar?" *Ans.* "He does." "What is the defendant's business?" *Ans.* "The defendant is the proprietor of a public house." "Was there any name on or behind the bar; and if so, what name?" *Ans.* "The name of B. O. Norton was in cut letters behind the bar."

There was other evidence in the case, describing the bar, and tending to show that within and upon the bar were bottles, jugs, and demijohns containing intoxicating liquor; also tumblers, and a tin drainer for tumblers, sugar-bowl and toddy stick; and that the defendant had made as many as three sales of intoxicating liquors within the time alleged in the indictment. The defendant being convicted, alleged exceptions.

E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth, on the authority of *Commonwealth* v. *Madden*, 1 Gray, 486, proposed to enter a *nolle prosequi*, and asked for the concurrence

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of the court, as required by *St.* 1855, *c.* 215, § 35, in all cases arising under that act.

Bigelow, C. J. The objection that the questions were put in such form as to inquire concerning the business of the defendant at the time of the trial, and were not confined to the period alleged in the indictment, does not appear to have been made at the trial. If their object was, by eliciting proof of the subsequent acts or occupations of the defendant, to lead to the inference that he had been previously engaged in the same pursuit, they were incompetent. But it is clear that they were not put with any such design. The substantive acts which the government sought to prove in support of the charge, as appears by the exceptions, were "three sales of intoxicating liquors within the time alleged in the indictment." And it does not appear that any evidence of subsequent acts was relied on. In this respect the case differs from *Commonwealth* v. *Page*, 6 Gray, 361, where the distinct fact of the keeping of liquor after the time averred in the indictment was allowed to be proved against the objections of the defendant. The form of the questions in the present case was open to objection, and it would doubtless have been corrected if that ground had been stated at the trial. But as the case does not show that the questions were put for the purpose of proving acts subsequent to the time laid in the indictment, or that any evidence of such acts was relied on in support of the charge, the defendant was not prejudiced in his rights by the mere form in which the questions were put.

The further objection to the evidence, that it was incompetent to offer proof of the business in which the defendant was engaged, proceeds on a misapprehension of the point decided in *Commonwealth* v. *Madden*, 1 Gray, 486. That case only determined that proof that a defendant kept an inn or public house, unaided by other evidence, could not be relied on as proof to sustain a charge of being a common seller of intoxicating liquors. But it was not decided that all evidence of the occupation or business of the defendant was incompetent. On the contrary, such testimony is clearly relevant and material, as forming a

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link in the chain of proof by which the charge of a common seller may be substantiated. Indeed it would be difficult, if not impossible, in many cases to exclude such evidence, because the sale of intoxicating liquors is often carried on in connection with, or as a branch of, another trade or calling in which the defendant is engaged. So it was in the case at bar. The evidence clearly showed that the inn kept by the defendant was used for the sale of liquors contrary to law. *Exceptions overruled.*

COMMONWEALTH *vs.* MARGARET BURKE.

A defendant who has been tried on two counts in an indictment before a jury, who have disagreed, may be put on trial on another count of the same indictment, before the same jury, at the same term of court.

INDICTMENT containing three counts; the first for being a common seller of intoxicating liquors; and the second and third for unlawful single sales to different persons. The defendant was put on trial in the superior court, and the district attorney introduced no evidence in support of the third count, (although the person therein named as the purchaser was in the court room throughout the trial, attending as a witness for the Commonwealth,) and stated that he did not ask for a conviction on that count. The jury did not agree, and were discharged from the further consideration of the case. On a subsequent day of the same term, the district attorney called up the indictment again for trial before the same jury, stating that he should ask for a conviction on the third count only. The defendant protested against going to trial under these circumstances, and objected to the admission of any evidence; but *Vose*, J., overruled the objection, and the defendant, being convicted on the third count and acquitted on the other two, alleged exceptions.

E. W. Bond, for the defendant, submitted the case without argument.

S. H. Phillips, (Attorney General,) for the Commonwealth.

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BIGELOW, C. J. We can see no error or irregularity in the proceedings at the trial of this cause. After the first trial upon two counts of the indictment, which resulted in a disagreement of the jury, the defendant was still liable to be tried on the whole indictment, and it was a matter entirely within the discretion of the prosecuting officer to determine whether she should be again tried on the whole or any part of the charge at the same term of the court. The only limitation in the exercise of this discretion was that the two counts upon which the disagreement had taken place could not be again put to the same jury. But as to the offence charged in the count which had not been tried, the jury could not be supposed to be under any bias or prejudice. The rights of the defendant are in no respect different from what they would have been if the charge had been set out in a separate indictment. It is the constant and well settled practice to put a defendant on trial for a crime before a jury who have previously tried him at the same term of the court for similar offences.

Exceptions overruled.

COMMONWEALTH *vs.* MICHAEL BURKE.

In this commonwealth, since the Gen. Sts. *c.* 131, § 12, as before, a witness cannot be examined as to his religious belief, either upon the *voir dire* or upon cross-examination.

INDICTMENT on St. 1855, *c.* 215, for unlawfully selling intoxicating liquors. At the trial in the superior court, a witness called in behalf of the Commonwealth, on being asked whether he was a Catholic, answered that he had no religion. The counsel for the defendant thereupon objected to the swearing of the witness; but *Vose*, J. directed the witness to be sworn, declined to grant a request of the counsel that the witness might be sworn upon his *voir dire* and examined as to his religious belief, and refused to allow the counsel to examine the witness in regard to his religious belief, after he had been sworn in chief. The defendant being convicted, alleged exceptions.

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E. W. Bond, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Bigelow, C. J. Any inquiry into the religious belief of the witness, either on the *voir dire* or upon cross-examination, was unauthorized and irregular, and was rightly disallowed by the court. *Commonwealth* v. *Smith*, 2 Gray, 516. The rule of the common law on this point is not changed by Gen. Sts. *c.* 131, § 12. The purpose and effect of this provision were to render persons who were disbelievers in any religion competent witnesses, and to cause their disbelief to be proved only to affect their credibility. The mode of showing the want of religious belief in a witness remains unaltered. *Exceptions overruled.*

David W. Barnes & another *vs.* Tilly Haynes.

After judgment for the plaintiff for damages and costs in a suit in equity for the obstruction of a way, the defendant cannot upon his own motion have the case referred to a master to ascertain the limits of the plaintiff's right of way.

Action of tort, praying for relief in equity under *St.* 1853, *c.* 371, for the obstruction of a passage-way. The declaration prayed for damages, for an injunction, and for further relief. The case was referred to a referee to report the facts, and upon his report judgment was rendered for the plaintiff, in June 1859. See 13 Gray, 188. The defendant paid the damages and costs, and the case was continued upon his motion to September term 1859.

The defendant then moved "that a master may be appointed with instructions to hear the parties, and ascertain and define the right of way which the court has found to exist over the defendant's land, both as to its extent and the character of the use to be enjoyed, and to report to this court such remedial acts as, in addition to the damages and costs already fixed and paid, the defendant ought to be by decree ordered to do and perform, so as to preserve all the just rights of both parties,

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with the least injustice and hardship to this defendant." Upon this motion the case was continued to this term.

G. Ashmun, for the defendant.

R. A. Chapman, for the plaintiff.

BIGELOW, C. J. The facts as stated in the case, and in the opinion of the court on the former hearing, are precisely the same as those found by the referee. 13 Gray, 188, 191. The "common use" or "common passage" here spoken of does not import that the parties held toward each other the relation of tenants in common, but only that there was a passage-way passing over land owned by the respective parties in severalty on each side of the division line of their estates, and that both parties used the passage-way to obtain access to their rear lands separately, each having acquired a right or easement of passage over land of the others by adverse user. It is therefore the common case of one party having a right of way over the land of another, which has been obstructed. As stated in the opinion of the court, a common way was created partly on the land of each for their common benefit. Each had a right to use his own land, and had acquired the right to use the other's for a way. There was no tenancy in common. The whole case proceeds on the idea, that each had acquired a right by adverse user in the other's land, which could not be if they were regarded as tenants in common in possession of the estate.

What then was the case? An action at law, praying for relief in equity, is to be treated in all respects as a bill in equity. *Irvin* v. *Gregory*, 13 Gray, 215. *Topliff* v. *Jackson*, 12 Gray, 565. This was then in effect a bill in equity, claiming a right of way, alleging its obstruction, and claiming damages and other relief. Judgment was given for damages, and the plaintiff asks no further relief.

But the defendant comes in, and on motion now asks that the court should enter a further decree or pass an order to give the defendant relief. We know of no rule or principle on which such a motion is based. The defendant in an equity suit may ask to have a decree which the plaintiff seeks modified, so that it shall not go to the extent which the plaintiff claims; as,

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in this case, to have the damages reduced or costs disallowed; but he cannot upon his own motion obtain a decree, embracing distinct and additional matters, for which the plaintiff does not ask. The relief granted must be confined to a remedy of the wrong of which the plaintiff complains. The defendant in a suit in equity can obtain relief only by a cross bill.

Motion overruled.

IRA YEAMANS & others *vs.* COUNTY COMMISSIONERS OF HAMPDEN.

An adjudication of county commissioners, on a petition for the new location of three highways and a fordway, that "the common convenience and necessity require that the prayer of the petitioners should in part be granted," is invalid for uncertainty, and cannot be made good by any subsequent action of the commissioners at a meeting called "to locate as aforesaid."

PETITION for a writ of *certiorari* to quash the proceedings of the respondents in locating anew by metes and bounds three highways in Westfield, and in adjudicating that the inhabitants of Westfield had acquired by prescription and long user a right to a fordway in that town, and defining it by monuments. The case is stated in the opinion.

R. A. Chapman & M. B. Whitney, (*W. G. Bates* with them,) for the petitioners.

H. Morris, (*N. T. Leonard* with him,) for the respondents, cited *Rutland* v. *County Commissioners*, 20 Pick. 80; *Commonwealth* v. *West Boston Bridge*, 13 Pick. 196; *Commonwealth* v. *Blue Hill Turnpike*, 5 Mass. 420; *Commonwealth* v. *Derby*, 13 Mass. 433.

DEWEY, J. The original petition to the county commissioners, which was the foundation of the proceedings now sought to be quashed, set forth that there were three certain highways and a fordway situated in Westfield, and particularly described in said petition, which were narrow, encroached upon, and without monuments, and prayed the commissioners to widen, straighten and establish monuments, or locate anew

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said roads, and make such alterations and repairs as they may deem advisable.

It was objected to these proceedings, that this original petition was defective, because the subject matter embraced four distinct ways. In the opinion of the court, though such a union of roads would be inexpedient, it would not necessarily be illegal. The different roads might be so connected with each other as to justify a proceeding under one petition; but it would be for the county commissioners, before entertaining such a petition, to see that the circumstances rendered it proper, and that the rights of all might be fully considered under it.

The fact that this petition was thus multifarious gives much greater force to the objection to these proceedings, upon the ground that it was merely an adjudication that "the common convenience and necessity require that the prayer of the petitioners should in part be granted." This obviously leaves it uncertain as to which of the three roads the adjudication is to apply, or whether it is exclusive of all of them, and applicable to the fordway merely. This adjudication must be held invalid for uncertainty, as was a similar adjudication in the case of *Danvers* v. *County Commissioners*, 2 Met. 185.

This objection is not obviated by the proceedings of the county commissioners in December 1857. That meeting was called under a motion based upon the adjudication just stated, and was by the terms of the notice "to locate as aforesaid." It was not a meeting called to make a further view, or to consider further the expediency of granting the prayer of the petitioners to locate the three roads and the fordway. No notice had been given to that effect, and the commissioners could not act upon that question at the meeting ordered for the mere purpose of "locating anew" under their former order as to the common convenience and necessity for so doing "in part."

As to the estoppel by reason of the acts of one or more of the present petitioners at this latter meeting, whatever might be its effect upon some of these petitioners, we see nothing that can thus operate as to one at least of the petitioners, Ralph Day

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He was directly interested in the subject, and did nothing by way of waiver of the objection now relied upon.

The enlarged order of December 1857, appearing to have been unauthorized, does not therefore give validity to the proceedings. As the case now presents itself to the court, it seems to be a proper case for ordering a *certiorari*.

Certiorari ordered.

Inhabitants of Chicopee *vs.* County Commissioners of Hampden.

On a petition to the county commissioners for the abatement of a tax on the ground of overvaluation by the assessors, the relative value of property subject to taxation is to be ascertained, not by comparison with any particular piece of property assessed to another person, but by comparison with the whole property subject to taxation in the town; and the exclusion of testimony of persons acquainted with the general value of property in the town, that the valuation complained of is not excessive or disproportionate, and is not excessive or disproportionate in comparison with the valuation of other specific parcels of property in the same town, is not necessarily erroneous.

A decision by county commissioners, on a petition for the abatement of a tax assessed upon the property of a manufacturing corporation, that the price for which the stock sold in the market was a conclusive test of the value of the company's real estate and machinery for the purposes of taxation, the corporation owning no other property and owing no debts, is an error for which a writ of *certiorari* will issue.

Hoar, J. The Chicopee Manufacturing Company, feeling aggrieved by the valuation of their real estate and machinery made by the assessors of the town of Chicopee for the purposes of taxation, petitioned the county commissioners of Hampden County for an abatement of the tax assessed upon them. All the preliminary proceedings required by law were regularly had, and upon a hearing of the parties, the commissioners ordered an abatement of a part of the tax. The inhabitants of Chicopee now petition that a writ of *certiorari* may issue, on account of errors in law apparent upon the record of the proceedings of the commissioners; and it was settled in *Gibbs* v. *County Commissioners*, 19 Pick. 298, that in such a case *certiorari* is the appropriate remedy.

The first objection to the proceedings of the commissioners

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is this; that the town of Chicopee contended "that the petitioners were not entitled to an abatement, unless they could show that their property was assessed at a higher rate relatively than the other property in the town; and that for this purpose it was not sufficient for them merely to prove an estimate of the value of their property, made by other parties at a lower sum or price than that adopted by the assessors," and offer to show that the assessment was not excessive or disproportionate, by evidence of persons acquainted with the general value of property in the town, who were called to testify generally to that effect, and by evidence of the like character in regard to other specific parcels of property assessed in the town of Chicopee; but that the commissioners refused to adopt this rule, and rejected the evidence, and held "that the only question open for their consideration, and upon which testimony was admissible, was the fair cash value of the real estate and machinery on the first day of May 1859."

We are of opinion that the position assumed by the town before the commissioners was not defensible, taken as a whole, and that the rejection of the evidence offered was not necessarily erroneous. Undoubtedly, the question which the commissioners are to determine is whether the taxpayer has been "overrated," or taxed more than his just proportion; and this involves a consideration of the relative value of property subject to taxation. But this relative value is to be ascertained, not by comparison with any particular piece of property assessed to another person, but by comparison with the whole property subject to taxation in the town. If the person applying to the commissioners has not been assessed for more than his fair proportion of the whole tax assessed, he has no cause of complaint because one of his neighbors has been taxed more and another less than the just proportion. Evidence that particular parcels of property had been valued at a lower rate would not therefore be sufficient.

On the other hand, we cannot suppose that it was contemplated by the legislature that upon the complaint of a single taxpayer the county commissioners should be obliged to revise

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the entire valuation of a town. The St. of 1853, c. 319, requires the valuation by the assessors of each estate at its fair cash value, and the oath taken by the assessors is to secure the practical adoption of that rule. The commissioners might rightly assume that this rule had been followed. Unless the ground taken were that the assessors had disregarded their duty in this respect, and assumed some arbitrary rate of valuation for estates generally, which they had not applied to the estate of the petitioner, we can see no necessity for evidence beyond that which would apply to the particular estate upon which an abatement was asked.

But in determining whether the estate of the petitioner had been correctly valued, we cannot doubt that the commissioners erred in deciding that the sales of the stock of a manufacturing company furnished the only test of the value of their real estate and machinery for the purposes of taxation. It is true that it was shown that the corporation owned no other property than this real estate and machinery, and that they owed no debts; and these circumstances perhaps made this species of evidence admissible. But it certainly could not be conclusive, if indeed it could be considered to any great extent trustworthy. The price which an undivided seven-hundredth part of any estate would command in the market, could hardly, in any case, be a test of the value of the estate as a whole. But when it is considered that it is an interest in an estate incapable of partition, an estate the use and employment of which is to be controlled by the will of the majority of owners, and which is to be subjected to the risks of such a business as that majority may choose to carry on with it; when its productive value may depend entirely upon the integrity and skill of the persons having a predominant influence in its management, or of those whom they may choose to employ; it is obvious that a share subject to these contingencies might be of very little value, and yet the market value of the whole estate be proportionately much greater.

In adopting this arbitrary standard of value, and rejecting all other evidence, however competent and appropriate to the issue,

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a manifest wrong was done, which it is the duty of this court to correct, and the writ of *certiorari* must therefore issue.

J. Wells, for the petitioners.

R. A. Chapman, for the respondents.

ELIHU ADAMS *vs.* COUNTY COMMISSIONERS OF HAMPDEN.

While a petition to the court of common pleas under *St.* 1859, *c.* 249, § 3, by the keeper of a jail, dissatisfied with the amount of the salary allowed him by the county commissioners, is pending, payment of the sum so allowed will not be enforced by mandamus.

BIGELOW, C. J. The petitioner, being dissatisfied with the sum allowed to him by the county commissioners as a compensation for his services as keeper of the jail and house of correction, applied, as he had a right to do, to the court of common pleas to determine the amount of such allowance under *St.* 1859, *c.* 249, § 3. By that provision of the statute, the superior court, to which the power of the court of common pleas was transferred by *St.* 1859, *c.* 196, has entire jurisdiction over the whole subject matter, and full authority to establish the compensation of the petitioner at such sum as to it may seem proper. It can either enlarge or diminish the allowance made by the commissioners. It is quite probable that the court would not, in the absence of proof of any facts or intervening circumstances which were not known to the commissioners when the petitioner's salary was established by them, diminish the amount which they allowed him. But that this power is vested in the court, and that it is not controlled in its action by the prior order of the commissioners, is the clear result of the broad and comprehensive language in which the jurisdiction of the subject matter is conferred by the statute upon the court. Until, therefore, the court has adjudicated on the petitioner's application and determined the sum to be allowed him, it is wholly uncertain whether he will be entitled to receive from the county

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treasury a compensation at the rate allowed him by the commissioners. This is a decisive objection to the writ of mandamus, which he now asks this court to issue.

But if this objection did not exist, the petitioner fails to show sufficient ground for granting the prayer of his petition. If he is correct in the assumption that the commissioners established his salary at too low a rate, and the superior court on his application should determine to raise it, he would then have an additional claim on the county for compensation for the same services for which he now claims payment. The effect therefore of granting the mandamus might be to divide the compensation for the same services during the same period of time into parts, and require the county to pay in separate sums that which was intended to be paid by a fixed salary or allowance at stated intervals. It is not reasonable that the county should be required to pay to the petitioner any part of his compensation, when he is voluntarily by his own promotion litigating with them as to its amount. Certainly under such circumstances we are not called upon, in the exercise of a sound judicial discretion, to grant him the remedy which he seeks to obtain under this petition. *Mandamus denied.*

G. Ashmun, for the petitioner, cited Rev. Sts. *c.* 14, §§ 31, 50, 51; *Lee* v. *Waldron*, 5 Pick. 327; *Harrington* v. *County Commissioners*, 22 Pick. 263; *Baker* v. *Johnson*, 41 Maine, 15; *Hull* v. *Supervisors of Oneida*, 19 Johns. 259; *People* v. *Edmonds*, 19 Barb. 468.

H. Morris, for the respondents, cited Rev. Sts. *c.* 14, § 5; *Brown* v. *Somerset*, 11 Mass. 221; *Lexington* v. *Mulliken*, 7 Gray, 280; *Day* v. *Hampden*, 11 Met. 379; *Adams* v. *Hampden*, 13 Gray, 441; *Hester's case*, 2 W. & S. 416; *Hill* v. *County Commissioners*, 4 Gray, 414; *Woodbury* v. *County Commissioners*, 40 Maine, 304.

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ORRIN FULLER *vs.* CHICOPEE MANUFACTURING COMPANY.

A complaint cannot be maintained on the mill act to recover damages occasioned to an unimproved or unappropriated mill site.

COMPLAINT on the Rev. Sts. *c.* 116, containing two counts, one for injuries by flowing a tract of twenty acres, and the other for flowing a tract of five acres with a mill site thereon. The respondents pleaded to the second count that the complainant had not occupied the mill site and begun to build a mill thereon; and so the fact was found to be by the officer who presided at the trial before a sheriff's jury, whose finding the parties agreed should be taken as conclusive, reserving the question of law raised by this plea. A verdict for the complainant on each count was returned to the court of common pleas and accepted, and judgment rendered thereon by *Mellen*, C. J. The respondent excepted to the ruling and judgment on the second count.

J. Wells, for the respondents.

W. G. Bates & M. B. Whitney, (*W. L. Smith* with them,) for the complainant, cited Angell on Watercourses, §§ 92–97, 135, 340–344; 3 Kent Com. (6th ed.) 437, 440, 446; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Wright* v. *Howard*, 1 Sim. & Stu. 190; *Blood* v. *Nashua & Lowell Railroad*, 2 Gray, 139; *Hill* v. *Ward*, 2 Gilman, 285; *M'Calmont* v. *Whitaker*, 3 Rawle, 84; *Gilman* v. *Tilton*, 5 N. H. 231; *Pitts* v. *Lancaster Mills*, 13 Met. 156; *Gould* v. *Boston Duck Co.* 13 Gray, 442; *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241; *Bigelow* v. *Newell*, 10 Pick. 348; *Newhall* v. *Ireson*, 8 Cush. 595; *Elliot* v. *Fitchburg Railroad*, 10 Cush. 191; *Embrey* v. *Owen*, 6 Exch. 353; *Blanchard* v. *Baker*, 8 Greenl. 253; Gale & Whately on Easements, 171; *Buddington* v. *Bradley*, 10 Conn. 213; *Bates* v. *Weymouth Iron Co.* 8 Cush. 548; *Andover* v. *Sutton*, 12 Met. 182; *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 205; *Baird* v. *Wells*, 22 Pick. 312; *Sts.* 1795, *c.* 74; 1824, *c.* 153, § 2.

BIGELOW, C. J. This is the first case, so far as we know, in which an attempt has been made by a complaint under Rev. Sts

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c. 116, or under the previous statutes enacted for the erection and regulation of mills, to claim damages for injury done to an unoccupied mill site. The fact that there is no precedent for such a claim is not conclusive, but it is strong evidence against the existence of any such right as the complainant sets up in the present case.

The right of the owner of land to the use of a stream flowing through his premises, so far as such use is reasonable and conformable to the usages and wants of the community and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below, is clear and indisputable. It is equally clear that by the well settled law of this commonwealth this right to the reasonable use and enjoyment of a stream of water is to be taken with this important limitation and qualification, that the owner of land who first erects a dam for the purpose of carrying a mill upon his own land, has the right to maintain it, although it may operate to set the water back to such distance and height as to prevent a proprietor above from having sufficient fall to carry a mill upon his own land. To the extent to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream, who have not improved their sites for the creation of water power and the driving of mills, is abridged and taken away. In such case prior occupancy gives priority of title. Although the right to the use of water is inherent in or appurtenant to land, it is nevertheless in a certain sense a right *publici juris*, and subject to the rule of law, which regards the erection of a dam for the purpose of creating mill power a profitable, beneficial and reasonable use of the stream, of which riparian proprietors on the same stream, who have not appropriated the force and fall of the water on their own land, cannot complain. It is *damnum absque injuria*. This principle was distinctly recognized in *Hatch* v. *Dwight*, 17 Mass. 296, and was fully illustrated and explained in *Cary* v. *Daniels*, 8 Met. 476.

It is in view of this well established doctrine of the common

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law of this state, that the provisions of the mill act, so called, are to be construed and administered. By the first section of the Rev. Sts. *c.* 116, which is substa ntially a re-enactment of *St.* 1795, *c.* 74, § 1, full power is given to any person to erect and maintain a water mill and dam to raise water upon any stream not navigable, according to the terms and conditions, and subject to the regulations, therein expressed. The only limitation on this power, so far as the rights of other owners of mill sites or water powers on the same stream may be affected by its exercise, is found in the second section of the same chapter, and in *St.* 1841, *c.* 18, which provide that no such dam shall be erected to the injury to any existing mill or of any mill site which shall have been previously used or occupied. But no provision is made to protect unoccupied or unimproved mill sites. Nor are they included specifically as a subject of damages in the fourth section of the statute, which provides for a compensation to parties "whose land is overflowed or otherwise injured" by the erection and maintenance of a dam. The great purpose of these statutes, as declared in the preamble to *St.* 1795, *c.* 74, was to prevent the erection and support of mills from being "discouraged by many doubts and disputes." They were not intended to confer any new right, or to create an additional claim for damages, which did not exist at common law. They only substituted, in the place of the common law remedies, a more simple, expeditious and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. It follows that, as a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he cannot maintain a complaint under the mill acts to recover similar damages. *Verdict on the second count set aside.*

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Orrin Fuller & others *vs.* Chicopee Manufacturing Company.

Upon a complaint on the mill act, damages may be recovered for flooding a well and the cellar of a house on the complainant's land.

Upon a complaint on the mill act, damages cannot be recovered for injuries to land which is not itself overflowed, but is rendered less valuable for building purposes by noxious and offensive smells proceeding from the adjacent lands when the water caused by the dam to overflow them is occasionally drawn off.

Complaint on the Rev. Sts. *c.* 116. At the trial before a sheriff's jury it appeared that a small portion of the land of the complainants was overflowed by the raising of the water by the dam; that upon the opposite side of the stream several acres of other lands in which these complainants had no interest were so far flowed, that in summer, when the water was high or the dam full, it was covered with water, but as the water was drawn off for use at the mills during the day a considerable surface of that land and a small strip of the complainants' land were uncovered and laid bare.

The complainants claimed increased damages, because by the raising of the dam a well on their land was injured by increasing the quantity and impairing the quality of the water therein, and the cellar of their dwelling-house was made wet, and in high water flooded; and were permitted, against the respondent's objection, to introduce evidence in support of both of these claims.

The complainants also "claimed, as a ground of increased damages, and produced the testimony of several physicians in support thereof, that by reason of the muddy and wet surface alternately covered and exposed, on both sides of the river, on land of the complainants, and on other land as well, there was occasionally a murky atmosphere and fogs, which tended to render the locality unhealthy and undesirable as a place of residence, thus reducing the value of the complainants' premises." To this claim and testimony in support of it, the respondents objected; but the objection was overruled.

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The complainants contended "that as a part of their lands was overflowed or injured directly by the raising of the water, if, in consequence of the injury, and of the raising of the dam, they suffered any further damage in their whole property, beyond the direct injury to the land itself by the water, as by way of their lands generally becoming unsalable, or reduced in their marketable value, or undesirable for occupation or residence, or in any other respect, the jury might estimate such further loss or damage, and award such amount therefor in their verdict as they should think right." And the case was so given to the jury, against the objection of the respondents.

The jury returned a verdict for the complainants, which was accepted by the superior court, and the respondents appealed.

J. Wells, for the respondents.

E. D. Beach, for the complainants.

Merrick, J. It is obvious that as an immediate consequence of the erection of a dam and raising a head of water, a landowner may sustain damage, beside the injury done to the land overflowed; as by obstructing his ways, cutting him off from convenient access to parts of his lands, disturbing the relation of one part to another. And it is possible that he may in like manner receive benefits from the same cause, that of raising and flowing the water, by the irrigating and fertilizing of an arid plain, giving him watering places in pastures where he had none before. The statute puts it as a case which may, but is not likely to, happen. "The jury, in estimating the damage to the land of the complainant, shall take into consideration any damage occasioned to his other land by the dam, as well as the damage occasioned to the land overflowed, and they shall also allow, by way of set-off, the benefit, if any, occasioned by such dam to the complainant, in relation to his said lands." Rev. Sts. *c.* 116, § 15. It was for injuries and benefits like these that this statute was intended to provide, when it declared, in § 4, that "any person whose land is overflowed or otherwise injured by such dam may obtain compensation therefor." The rule therefore to be derived from the statutes, construed together, seems to be, to estimate the pecuniary loss arising to the proprietor from

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the direct injury done to his estate, taken as a whole, by flowing, deducting therefrom any benefit which may be done to the same estate by the same cause, namely, by flowing. *Palmer Co.* v. *Ferrill*, 17 Pick. 58.

The manifest object of this remedial statute is to secure to a land-owner, whose land has been flowed or directly damaged by water raised by a dam for mill purposes by another on his own land, a fair and adequate compensation for the damage arising directly from that cause. The law does not justify an allowance for remote, possible or speculative damages, or damage to any other subject than land, or by any other means than raising water by a dam for mill purposes. The rule admits all direct damage by raising water upon a complainant's land, or preventing all valuable growth, or by saturating it so as to render it unfit to produce good grass, by separating one part of the complainant's land from another, so as to render bridges or causeways necessary, or other direct damage. The jury were therefore properly allowed to consider the injury to the well and to the cellar of the dwelling-house on the premises, in their estimation of damages which the complainants were entitled to recover. But the complainants seek further to recover for damage done to other lands, uplands not reached or affected by the water raised by the dam, but in consequence of noxious and offensive smells, proceeding from the land flowed when not covered by water, by means of which such uplands are rendered less eligible and valuable as building lots. This is too remote, and not within the scope of the mill act. *Eames* v. *New England Worsted Co.* 11 Met. 570. *Verdict set aside.*

RANSFORD W. KELLOGG *vs.* WALTER LOOMIS & others.

A deed not acknowledged or recorded is no evidence of seisin or possession in the grantee, except against the grantor and his heirs.

ACTION OF TORT for breaking and entering the plaintiff's close in Southwick, described as situated on the North Sodom

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Mountain, and being lots No. 29 and 30, originally set out to James Smith and John Campbell. Trial in the superior court before *Rockwell*, J., to whose rulings and instructions the defendants alleged exceptions, the substance of which is stated in the opinion.

H. Morris & N. T. Leonard, for the defendants.

F. Chamberlin, for the plaintiff.

Bigelow, C. J. The deed from Samuel Campbell to Walter Rising of lot No. 30, not having been acknowledged or recorded, was not evidence of seisin or possession as against the defendants, and was inadmissible to enable the plaintiff to maintain his action for trespass on that lot. This precise point was decided in *Estes* v. *Cook*, 22 Pick. 295. We do not understand the statement, in the bill of exceptions, that this deed was admitted "to disprove outstanding title in the grantor or his heirs." No such issue was open in the case. The defendants made no claim of title under Samuel Campbell or his grantee. The effect of putting the deed in evidence was to prove title in the plaintiff to lot No. 30, because he claimed by a grant directly from the heirs of Walter Rising, to whom the deed of Samuel Campbell purported to convey a portion of the land in controversy. By disproving title therefore in the grantor, the plaintiff was in fact allowed to prove a grant in the line of his own title by a deed which was clearly incompetent. Such being the case, the introduction and admission of the deed in evidence operated as an evasion of the rule of law that a deed not acknowledged or recorded is invalid as against all persons but the grantor and his heirs.

It was suggested that if this deed was erroneously admitted, the mistake was corrected by the instructions given by the court to the jury. But it seems to us not only that the jury might have been misled by having a deed before them which tended to trace title to a part of the *locus* into the plaintiff, but that the instructions, so far from obviating this difficulty, were calculated to enhance it, and left the jury to find title to lot No. 30 in the plaintiff, under and by virtue of this invalid deed. The case was presented by the court to the jury in two aspects,

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and they were authorized to find a verdict for the plaintiff either upon his paper title or upon proof of an earlier possessory right. It is impossible for us now to know on which ground the verdict was based. If it was founded on the title of the plaintiff by grant, the jury must have given effect to the deed from Campbell to Rising, because there was no other evidence of title in him by deed to lot No. 30, except under that conveyance. The deed from Oliver Smith, under which the plaintiff also claimed, conveyed only lot No. 29. Upon this point the court seems to have been under a misapprehension, and by its instructions to have proceeded on the ground that the deed from Oliver Smith comprehended lots No. 29 and 30. If the verdict for the plaintiff was rendered on the ground that the deed from Oliver Smith conveyed, as the court seems to have supposed, a title to lot No. 30, it was founded on a mistake; if it was based on the deed from Campbell to Rising as conveying a title to that lot, it was rendered on incompetent evidence; and in either case it was clearly erroneous.

Exceptions sustained

WARNER C. STURTEVANT *vs.* CHARLES PHELPS.

In an action on the covenant against incumbrances to recover the value of a right of dower not released in the deed under which the defendant derived his title, and since purchased by the plaintiff, the plaintiff introduced evidence of the amount paid by him therefor, and of the value of the land, independently of the buildings, at that time. *Held*, that the defendant might introduce evidence of the increase in value of the land by buildings and other improvements since the deed under which he derived his title

ACTION OF CONTRACT on the covenant against incumbrances in a deed made by the defendant to the plaintiff on the 27th of March 1847.

At the trial in the superior court before *Rockwell*, J., the plaintiff gave in evidence a warranty deed of the premises, dated the 20th of September 1845, from Wells Lathrop, in which his wife did not join, to John Howard, whose title afterwards vested by mesne conveyances in the defendant; the deed declared on; and a deed dated January 26, 1859, from Mr. and Mrs. Lathrop to the plaintiff, releasing her right of dower.

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The plaintiff was called as a witness in his own behalf, and asked what sum he paid for the release of Mrs. Lathrop's right of dower. The defendant objected to this inquiry for any other purpose than to limit the measure of damages; but the objection was overruled, and the question allowed to be answered. The plaintiff also introduced evidence of the value of the land without the buildings in January 1859.

The defendant offered evidence that since the deed of Lathrop to Howard the land had been greatly increased in value by improvements made by the plaintiff and others, independently of the buildings. But the judge excluded the evidence; refused to instruct the jury, that, "in estimating the value of Mrs. Lathrop's dower, the estate was to be taken at its value when owned by Mr. Lathrop, with the increased value by natural means only;" and instructed them that the plaintiff, if entitled to recover at all, was entitled to recover the sum which he had paid to procure the release of Mrs. Lathrop's right of dower, if in their judgment it was reasonably and fairly paid. A verdict was returned for the plaintiff, and the defendant alleged exceptions.

N. A. Leonard, for the defendant.

J. Wells, for the plaintiff, cited *Prescott* v. *Trueman*, 4 Mass. 627; *Wyman* v. *Brigden*, 4 Mass. 150; *Chapel* v. *Bull*, 17 Mass. 213; *Harlow* v. *Thomas*, 15 Pick. 66; *Batchelder* v. *Sturgis*, 3 Cush. 201; *Hall* v. *Dean*, 13 Johns. 105; *Norton* v. *Babcock*, 2 Met. 510; Rawle on Cov. 131.

DEWEY, J. In estimating the damages for the breach of the covenant of the defendant, by reason of the inchoate right of dower of Mrs. Lathrop, the wife of the grantor of the defendant, and under whose title the estate is held, the inquiry is as to the rule for estimating the value of the land to which the right of dower attaches. As the question is one in reference to a claim where the alleged improvements have been made by one holding under an alienation by the husband, the rule of estimating the value of the property will be to estimate the same as it was at the time of the alienation by the husband, as to its improvements by cultivation and buildings. It was com-

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petent, as bearing upon this question, for the defendant to introduce evidence to show that, since the execution of the deed of the husband, the premises had been greatly increased in value by improvements made thereon by the labors and expenditures of the grantee of the husband, and those holding under such grantee, upon the land itself, as well as by the buildings erected thereon. *Cutler* v. *Ware*, 9 Mass. 218. *Powell* v. *Monson & Brimfield Manuf. Co.* 3 Mason, 375. This question in a broader aspect will be found fully considered in Mr. Washburn's valuable treatise on the American Law of Real Property, Vol. I. 238. The proposed evidence tending to show that, since the deed of Wells Lathrop to Howard, the premises had been greatly increased in value by improvements and expenditures upon the land itself, as well as by erecting buildings thereon, was therefore competent, and especially so to enable the jury properly to consider the case in reference to the evidence that had been introduced into the case as to its present value.

Exceptions sustained.

Charles A. Winchester, Administrator, *vs.* Theodore Stebbins.

A policy of insurance procured by a man on his own life, payable to himself and his executors, administrators, and assigns, was assigned by him; while held by the assignee, became forfeited by failure of the assured to pay the premiums; was afterwards assigned by the assignee to a brother of the wife of the assured, and, with the consent of the assured and the insurers, renewed by her brother for her benefit; the premiums were subsequently paid by him as they accrued; and the amount of the policy was paid to him by the insurers upon the death of the assured. *Held*, that the administrator of the estate of the assured could maintain no action against him for any part of the money so received.

Action of contract brought by the administrator of the estate of Charles Stearns, (which was insolvent,) to recover the amount of a policy obtained by him on his life, payable to himself, his executors, administrators and assigns, which had been paid by the insurers to the defendant, under circumstances agreed by the parties, and stated in the opinion.

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C. A. Winchester, pro se.

R. A. Chapman, for the defendant.

MERRICK, J. This action cannot be maintained. The defendant is equitably entitled to the money which he received of the insurance company to hold in trust for the benefit of Mrs. Stearns. The policy originally obtained by the intestate had been assigned by him to Ocran Dickinson, and while held by the latter was forfeited by the failure of the assured to pay accruing premiums, according to stipulations contained in it. It was never afterwards renewed or revived by him or for his benefit. It was further assigned by Dickinson to Charles Stebbins, and by the latter to the defendant. The insurers knew of this assignment and assented to it. While the contract ceased to be in force by the failure of the intestate to make the requisite payments of accruing premiums, he agreed and consented that the renewal of it might be effected by the brother of Mrs. Stearns, by the payment of the required sums of money for the purpose for her sole benefit. It was caused by them to be renewed in pursuance of this agreement. The intestate never afterwards paid anything upon it, but the premiums from time to time, as they became due, were advanced by the defendant or by his brother Charles. Upon the death of the intestate, the insurers made no objection to the claim of the defendant for the sum secured by the policy, and it was paid over to him. The administrator of the intestate shows no just right or title to it; and

Judgment must therefore be entered for the defendant.

LEVI P. ROWLAND *vs.* ROBERT E. COOPER.

One who signs a receipt for goods attached, agreeing to redeliver them to the attaching officer or his order on demand, free from all charge and expense to the officer or the creditor, cannot discharge himself by an offer to redeliver them before demand, unless expressly authorized so to do by the terms of his receipt.

ACTION OF CONTRACT by a deputy sheriff upon a receipt taken for goods attached by him. Trial in the superior court

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before *Rockwell*, J., to whose rulings the defendant excepted. The case is stated in the opinion.

N. A. Leonard, for the defendant.

S. E. Seymour, for the plaintiff.

DEWEY, J. The receipt given by the defendant to the plaintiff states upon what process the goods were attached, and the time when the same was returnable into court, apprising the defendant fully of the relation of the plaintiff to the property, and his occasion for demanding it at a future day, to be levied upon by an execution. The defendant, by the terms of his contract, "promises and agrees safely to keep and to redeliver all the property to said officer or his order on demand, to be delivered at the store of Horace Holcomb in the like good order and condition that the same is now in, free from all charge and expense to the said officer or the creditor." Judgment having been duly rendered in the action, an execution was issued thereon and placed in the hands of the officer, who in thirty days demanded the same of the defendant, but the same was not then redelivered; and the further question is whether under the terms of this receipt the defendant has discharged himself, by his offer pending the action upon which the goods were attached, and before judgment therein, to redeliver said goods, and a request to the officer to go to Holcomb's store with him and receive the same, the plaintiff neglecting and refusing to comply with such offer.

The presiding justice ruled that the officer was not obliged to accept the goods as thus offered, and that such offer did not constitute a defence to the present action. This ruling, in the opinion of the court, was correct. The contract was "safely to keep and to redeliver the property to the said officer on demand." This gave no authority to the receiptor at his own wish to redeliver the property, but he was to keep the same until demanded by the officer. Giving this effect to the receipt, it is effective as an arrangement to secure the purposes of the attachment, and a permanent disposition of the custody of the property until it is required for a levy thereon to satisfy the judgment. But the construction of the receipt assumed by the defendant would subject the officer to the liability of having

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the goods returned to him the next day after they were receipted for, and this as often repeated as the various subsequent receiptors might elect. Further, by the terms of this contract, the goods were to be kept "free of charge or expense to the officer or the creditor." This was a valuable privilege, and when once secured by the contract of a receiptor the officer may well insist upon this stipulation. It may be more beneficial than to have the goods redelivered to him, to be thereafter kept at his or the creditor's cost and charges. But if the property were held to be returnable at the election of the receiptor, this provision would be defeated from the time of such return.

Upon this question we find an adjudication by the supreme court of New Hampshire in the case of *Scott* v. *Whittemore*, 7 Foster, 309, where it was held that a receiptor cannot discharge himself from his contract to keep and return the property attached by an officer, by a notice to such officer that he will return the property on a given day, unless the contract contains a provision for that purpose. Such a provision may always be inserted when such is the intended arrangement, and thereby effectually secure such privilege to the receiptor.

In the absence of any such stipulation, the court are of opinion that such right does not exist at the election of a receiptor.

The defence relied upon was not a valid one, and a verdict was properly rendered for the plaintiff.

Exceptions overruled.

JOHN N. BULLARD *vs.* ALONZO WAIT.

The owner of a horse kept at a livery stable agreed at another place to sell it, received the price from the purchaser, and at the same time the seller paid the stabler for the previous keep of the horse, and the purchaser directed him to continue to keep it and feed it on hay, and promised to pay him therefor, and the stabler afterwards removed the horse from the stall in which it had been to another more convenient for feeding it with hay. *Held*, that, in the absence of fraud, these facts showed a delivery of the horse as against a subsequent attaching creditor of the seller.

ACTION OF TORT for the conversion of a horse of the plaintiff. At the trial in the superior court, before *Rockwell*, J., the plaintiff proved the following facts:

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James Turner and M. D. Field being joint owners of a span of horses, of which this was one, in the livery stable of Field in Springfield, the plaintiff, on a Sunday evening at nine o'clock, at his room in a hotel in Springfield, agreed with Turner that, if he and Field would make a division of the horses, he would buy his horse of Turner, and pay him for it one hundred dollars; Field then coming into the room, Turner and Field made a division, and the plaintiff paid Turner the price agreed on; Turner then paid Field for keeping the horse to that time, and the plaintiff told Field to continue to keep the horse and keep it cheap on hay, and he would pay for it in future. The next morning the defendant, a deputy sheriff, attached the horse at Field's stable, Field being present, as the property of Turner, and no objection was made to his so doing, nor was any notice of any transfer of the property given to him. Neither Turner nor Field went to the stable or near the horse at the time of the division, nor did Turner or the plaintiff at the time of the alleged sale; and neither the plaintiff nor Turner saw the horse on the evening of the sale, or until after the attachment the next morning. After the attachment the plaintiff paid Field for keeping the horse from the time of his purchase to the time of the attachment. Evidence was admitted, against the defendant's objection, that Field, on the morning after the sale, and before the attachment, removed the horse from the stall in which it had been to another more convenient for feeding it with hay as directed.

The defendant asked the court to rule that these facts showed no such delivery of the horse to the plaintiff and possession of the horse by him as would constitute a valid sale to the plaintiff as against an attaching creditor of Turner. But the court refused so to rule; and instructed the jury that these facts were competent for them to consider upon the question of fraud; and that, if they found the sale was not made to defeat, delay or defraud the creditors of Turner, it was valid. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. M. Stearns & G. H. Knapp, for the defendant, cited *Lanfear* v. *Sumner*, 17 Mass. 110; *Carter* v. *Willard*, 19 Pick. 1; *Rourke* v. *Bullens*, 8 Gray, 549.

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E. D. Beach, for the plaintiff.

METCALF, J. The horse, when the plaintiff bought it of Turner, was in Field's livery stable, where it had been previously kept; and the plaintiff, after paying for it, requested Field to keep it for him and feed it on hay, and promised to pay him for keeping and feeding it. Field thereupon removed the horse from the stall which it had before occupied; put it into another which was more convenient for feeding it with hay; and so fed it, according to the plaintiff's request. The plaintiff afterwards paid Field for keeping the horse, up to the time when the defendant attached it. These facts, we think, fully warranted the instruction to the jury, that the sale was valid, as against Turner's creditors, if it was not made to defraud them. Though it was made on the Lord's day, yet as it was made after sunset it was not prohibited by the Rev. Sts. *c.* 50.

The only question argued is, whether there was such a constructive delivery of the horse as rendered the sale valid against third persons. And the decision in *Tuxworth* v. *Moore*, 9 Pick. 347, seems to us to be conclusive in the plaintiff's favor. That case has been repeatedly recognized as correctly adjudged. See *Whipple* v. *Thayer*, 16 Pick. 28; *Carter* v. *Willard*, 19 Pick. 8; *Appleton* v. *Bancroft*, 10 Met. 236.

Evidence was rightly admitted that Field changed the horse's stall, because it tended to prove that he had consented to keep the horse for the plaintiff, according to his request. For any other purpose we suppose that evidence was immaterial. *Elmore* v. *Stone*, 1 Taunt. 460. Blackb. Sales, 32.

Exceptions overruled.

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Cheney Green *vs.* Levi P. Rowland.

A. delivered a chattel to B. under an agreement that it should belong to B., that B. need not pay for it until he sold it, and should then pay a certain price for it; and B. redelivered the chattel to A. for sale. *Held*, that, in the absence of fraud, the title had passed to B. even as against attaching creditors of A.

Action of tort for the conversion of an iron safe, to which the plaintiff claimed title under a sale from M. E. Willey, and which was attached by the defendant as a deputy sheriff on a writ against Willey, upon the ground that such sale was fraudulent and void as against Willey's creditors.

At the trial in the superior court before *Rockwell*, J., it appeared that Willey offered the safe to the plaintiff for fifty dollars, and the plaintiff refused to buy it at any price and pay money for it; that Willey then told him to take it, and he need not pay for it till he sold it, and should then pay fifty dollars for it; that it was formally delivered to the plaintiff, but was never used or paid for by him, and was redelivered by him to Willey to be sold on the plaintiff's account; and that at the time of the sale Willey was insolvent, and the plaintiff knew it. There was also evidence introduced by the plaintiff that the sale from Willey to him was made in good faith, and not for the purpose of defeating, delaying or defrauding Willey's creditors.

The judge, at the request of the defendant, instructed the jury, "that if Willey, being in embarrassed circumstances, had any purpose to put his property out of the reach of attachment in making the conveyance to the plaintiff, and the plaintiff took the conveyance, knowing that purpose, the sale was void as against the creditors, although the debtor might, at the time of making the conveyance, have believed that it would be better for his creditors to make the conveyance, and intended in the end that his creditors should be paid;" and added "that in order to make the sale void it must be tainted with fraud in both parties; that the plaintiff must have known and understood Willey's purpose to defeat, delay and defraud his creditors, and assented to and participated in that purpose."

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The defendant asked the court further to instruct the jury, "that if the safe was transferred to the plaintiff with the agreement that he was not to pay anything for it till he sold it, and was then to pay fifty dollars for it, the plaintiff having never sold the safe and having returned it to the possession of Willey, the transfer to the plaintiff was void as against Willey's creditors." But the judge declined so to rule; and instructed the jury, "that the sale was a good sale; and that it passed the title to the plaintiff, who became liable to sell the safe and pay for it within a reasonable time, and to pay for it whether he sold it or not; leaving the question of fraud to be determined under the instructions already given." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. L. Soule, for the defendant, cited *Fletcher* v. *Willard*, 14 Pick. 464; *Macomber* v. *Parker*, 14 Pick. 497; *Oriental Bank* v. *Haskins*, 3 Met. 332.

G. M. Stearns, for the plaintiff.

Hoar, J. We think the instructions given to the jury were substantially correct. The presiding judge instructed them that, in the absence of fraud, the sale was a good sale; by which we understand that he meant a sale valid between the parties to pass the property. It was an agreement that the plaintiff should take the property, that it should thenceforth belong to him, that he should pay a price agreed upon, and this agreement was accompanied with a delivery. These are all the legal requisites to a good sale.

The peculiar agreement as to the credit to be given for the payment of the price, and the subsequent return of the property to the possession of the vendor, were undoubtedly very significant facts for the consideration of the jury upon the question of fraud. But they did not in themselves necessarily constitute fraud, nor did they make the sale void as against the creditors of the vendor, unless done with a fraudulent intent. The defendant asked no instructions as to what would constitute fraud against creditors, which were not given by the court, except the request which was thus properly refused.

Exceptions overruled.

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Austin Bliss & another *vs.* Lothrop Clark.

A committee authorized by vote of the proprietors of a meeting-house to sell it on a day named have no authority to make the sale on any other day.

When the evidence offered by the plaintiff is not sufficient to maintain the action, he has no ground of exception to the admission of incompetent evidence offered by the defendant.

The maker of a promissory note given for the purchase of a chattel, which the vendor has no authority to sell, may set up this want of authority in defence of an action on the note by the vendor, without returning the bill of sale, and even if he afterwards sells for a valuable consideration whatever title he obtained by the transaction.

Action of contract on a promissory note for $145.25. Answer, want of consideration. At the trial in the superior court it appeared that the defendant gave the note for the purchase of a meeting-house in Monson, which he bought by auction on the 31st of May 1859, and received a bill of sale from the plaintiffs as a committee of the proprietors of the meeting-house; that he never returned the bill of sale; but never took or attempted to take possession of the building; and within a week after his purchase sold his title to Cyrus Day, in consideration of the payment of ten dollars and of Day's agreement to defend him against this note. *Rockwell*, J. directed a nonsuit, and the plaintiff alleged exceptions, the substance of which is stated in the opinion.

F. Chamberlin, for the plaintiffs.

H. Morris, for the defendant.

Metcalf, J. The defendant denies that the vote of May 5th 1859, to sell the meeting-house, was duly passed by those who had a legal right to authorize the sale thereof, and also denies that two of the committee of three who were chosen to carry that vote into effect had authority to make the sale. But we need not decide either of these questions, because, though both should be decided in the plaintiffs' favor, they could not prevail; inasmuch as there is no evidence that any authority was given, or attempted to be given, to the committee, to sell the house on the 31st of May.

The votes at the meeting on the 5th of May directed the sale of the house to be made at auction, under the charge of the

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committee, on the 19th of May, at two o'clock P. M.; and the meeting was adjourned to the same 19th of May, at one o'clock P. M. The exceptions state that the judge, at the trial, ruled that the record of these votes "was not in the case;" by which we understand him to have ruled that it was not legal evidence to support the plaintiff's case. And it is clear that, standing alone, it did not show that authority was given to the committee to sell the house at any other time than on the 19th of May. If, at the adjourned meeting on that day, any vote was passed, giving authority to the committee to make sale of the house on the 31st of May, the plaintiffs should have produced the record of such vote, as part of the evidence necessary to show that authority. No such record was offered by them, nor has their counsel suggested that there is any such.

When the evidence offered by a plaintiff is not such as will support his case, he has no legal ground of exception to the admission of incompetent testimony offered by the defendant. Its admission does him no harm; because, if it had been excluded, yet he could not have recovered. We therefore cannot give the plaintiffs a new trial on account of the admission, upon the defendant's motion of oral testimony as to what passed at the adjourned meeting on the 19th of May; although that testimony was not legally admissible.

The note in suit is of no validity in the plaintiffs' hands, it having been given for a meeting-house sold by them without authority from the owners. The plaintiffs conveyed to the defendant no title to the house, and he is not bound to pay them for it.

The judge correctly ruled that the defendant was not estopped, by his bargains with Cyrus Day, nor by any other act or omission, to "avail himself of this defence."

Exceptions overruled

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Gurdon Bill *vs.* Gilbert Barker.

A guaranty of payment for goods to be supplied to two partners is discharged by an arrangement between them and the creditor, by which, before payment for goods so supplied, one of the partners goes out of the business, and the other gives his individual note, payable to the creditor and another person jointly, and no demand of payment is made on the outgoing partner.

Action of contract on a guaranty by which the defendant requested the plaintiff to supply Franklin Barker and H. H. Shumway, partners, under the name of Barker & Shumway, with certain books, not exceeding one hundred copies at a time; agreed "to become responsible to pay for the same, provided said Barker & Shumway shall fail to pay;" and waived all notice, either of amount furnished, or of default in payment Trial in the superior court before *Rockwell*, J., to whose rulings the plaintiff alleged exceptions. The case is stated in the opinion.

E. W. Bond, for the plaintiff.

F. Chamberlin, for the defendant.

Dewey, J. The various acts on the part of the plaintiff in reference to the subject of the guaranty have discharged the guarantor. The new arrangement made with Franklin Barker, discontinuing the dealing with Barker & Shumway, as was the arrangement existing when this guaranty was given, and in reference to which it was designed as security, operated to change the position of the guarantor. In concurrence with Franklin Barker, it was arranged by the plaintiff, soon after the first sale of books, and before the same had reached the vendees, that Shumway should go out of the concern, and in accordance with this separation of the parties, the negotiable note of Franklin Barker alone was subsequently taken, payable in sixty days to G. & F. Bill, a new firm, at the Chicopee Bank, and discounted, which note, not having been paid, was renewed by another note of like amount payable to the same persons in thirty days. This latter note was held by the payees as their property, and payment demanded of the maker by G. & F. Bill.

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The mere taking of a promissory note for the amount of a debt contracted under a guaranty does not necessarily discharge a guaranty for articles of merchandise, for which the note is given; but here the whole course of dealing had changed. Shumway was no longer treated as a joint debtor with Barker, and the notes given for the original indebtedness were not only signed by Franklin Barker alone, but made payable to a new firm, not the original creditor holding the guaranty. The letter of G. & F. Bill to Barker of May 7th 1858 treats the debt as the sole debt of Barker. The guaranty of the defendant was for goods to be furnished Barker & Shumway, and he agreed "to become responsible to pay for the same, provided Barker & Shumway shall fail to pay."

Upon these facts thus proved and uncontroverted, in the opinion of this court, the defendant was entitled to a verdict, and the presiding judge properly stated that he should direct the jury to render a verdict for the defendant, unless a nonsuit should be consented to. *Exceptions overruled.*

DANIEL W. BEMIS *vs.* GEORGE R. HOSELEY & another.

A release, not under seal, of one partner, by a creditor of the partnership, in consideration of a payment of part of the debt, though out of the funds of the partnership, is no discharge of the residue.

ACTION OF CONTRACT on three promissory notes, signed by a partnership. At the trial in the superior court it was agreed that the firm being insolvent and unable to continue their business, one of the partners paid to the plaintiff out of the partnership funds one quarter of the amount due on two of the notes; and the plaintiff signed a writing, not under seal, acknowledging the receipt of one dollar from the partnership, and, in consideration thereof, releasing and discharging that partner from all demands and causes of action against the partnership. *Rockwell*, J. gave judgment for the defendants, and the plaintiff appealed.

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J. M. Stebbins, for the plaintiff.

W. L. Smith, for the defendants.

By the Court. The payment of a part only of a debt due and payable is no consideration for the release or discharge of the residue, by a receipt not under seal. *Harriman* v. *Harriman*, 12 Gray, 341. *Judgment for the plaintiff.*

Connecticut River Railroad Company *vs.* Samuel Williston.

If an agreement between two railroad corporations provides that what is reasonable and necessary to be done by one of them, at the expense of the other, pursuant to certain contracts between them, and what is a reasonable expense for doing it, shall be determined by the superintendent of the first corporation and another person named; and afterwards, and before the time for making the determination, the office of such superintendent is abolished by the corporation, and the duties of superintendent assigned to its president; he is the proper person to join in the determination, and it is for the jury to determine who is in fact discharging the duties of superintendent at the time of the determination. And an agreement between such president and an agent of the other corporation, that the latter may be present at the hearing and may make objections to any item of such expense is immaterial, and its admission in evidence no ground of exception.

In an action upon a guaranty of payment of all money to be found due from one corporation to another by persons named in a written agreement, the failure of the second corporation to do a certain thing which it had agreed to do before the determination of that amount is no ground of defence, if the persons named in the agreement have proceeded to make the determination with the assent of both corporations.

Merrick, J.* It appears from the bill of exceptions that on the 20th of March 1858 the plaintiffs and the Hampshire and Hampden Railroad Company made and entered into certain written contracts with each other respecting their joint occupancy of the new passenger-house at Northampton. It was a part of their agreement, as expressed in one of these contracts, that what was reasonable and necessary to be done by the last named company, at the expense of the first, pursuant to their mutual agreements in carrying the proposed object into effect, and what would be a reasonable expense to be incurred in doing it, should be deter-

* Dewey, J. did not sit in this case.

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mined by Samuel Ashburner and the superintendent of the Connecticut River Railroad Company. The defendant, in the written guaranty declared on in this action, promised the plaintiffs, for a consideration, the sufficiency of which is not contested, that whatever should be found due to them on the performance of that contract should be promptly paid. Afterwards, and subsequently to the time when the parties had come into the actual use and joint occupancy of the passenger-house, the several claims which the plaintiffs preferred for fitting it up for their common use, and for the alleged execution on their part of all that was necessary to be done to carry the proposed object into effect, were left to the determination of said Ashburner and of Daniel L. Harris, the president and acting superintendent of the Connecticut River Railroad Company. They found the amount to be paid by the Hampshire and Hampden Railroad Company to be $ 2362.31, which is the sum demanded in this action.

The first and principal question which arises upon the facts stated in the bill of exceptions, is whether Harris was, within the meaning of the provisions of the contract between the parties, at the time when he thus acted with Ashburner in ascertaining the amount which was due from one of them to the other, the superintendent of the Connecticut River Railroad Company. This is denied by the defendant, and he accordingly insists that the accounts between the parties have not been properly adjusted according to the terms of their agreement, and that the sum demanded in this suit has never been rightly found to be justly due from the Hampshire and Hampden Railroad Company. But he concedes the correctness of the position taken by the plaintiffs, that the parties did not intend, and that it would not be a correct conclusion from their contract upon a proper interpretation of its provisions to assert, that the determination of the amount due to the plaintiffs was to be made in connection with Ashburner by Brinsmade, who was the superintendent when the contract was entered into; but that it was to be made by the person, whoever he should be, who should be such superintendent when the time should arrive for

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making such determination. This position, concerning which there is no difference of opinion between the two parties, appears to us to be perfectly correct; and in view of it, there seems no difficulty or doubt in reaching the conclusion that Harris did occupy such position and stand in such relation to the company, that he is to be considered as the person designated in the contract, who was to act in concert with Ashburner in ascertaining and determining the amount which was due and payable to the plaintiffs under and in pursuance of the contract. It is true that he was not nominally and in terms called the superintendent; but he was so in fact. The jury have found that he was the acting superintendent, and of this, upon the evidence reported, there could be no doubt. He was the president of the corporation; and the stockholders at a legal meeting had voted that the duties of president and superintendent should be discharged by one and the same person. In pursuance of this vote, the directors abolished the office of superintendent as a separate and distinct employment; but all the duties pertaining to it remained still to be performed, and they were assigned to the president, who thereupon became subject to the obligations, and entitled to exercise all the power and authority, requisite to the discharge of the duties imposed upon him in this new relation. He was therefore, though his office was described by another name, both in fact and in right the superintendent of the company; and occupying that position, he was very plainly the person who was to ascertain with Ashburner, what was reasonable to be done by the plaintiffs in the performance and execution of their contract, and what sum of money such performance would entitle them to demand and recover of the Hampshire and Hampden Railroad Company. The plaintiffs had an uncontroverted right to appoint their own superintendent, and thus, by the terms of the contract, to name the person who, with Ashburner, was to find what was due to them, and to decide upon the points of difference between the parties. It certainly could make no difference to the Hampshire and Hampden Railroad Company, nor does it show the failure of a strict compliance with the terms of the agreement, that the

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person who was invested with the authority and subjected to the responsibilities of the superintendent held also another office, or was designated by a different name. In the interpretation of a contract, the real intention and purpose of the parties, when plainly and distinctly manifested in its provisions, is always to prevail over the mere literal signification of particular expressions which may be used in it.

The court being of opinion that it results from the votes of the stockholders and directors of the company that Harris was the superintendent of the Connecticut River Railroad Company, if he entered upon and was engaged in the discharge of the duties which pertain to that office, according to the usual and ordinary distribution of labor and service to be performed by and among the persons employed in conducting the business of railroad companies, it was competent and proper to submit to the jury, in conformity to the request of the plaintiffs, the question whether he was in fact acting in that capacity. Upon this question, the testimony of Harris, that he was engaged in the discharge of those duties and that the defendant knew it, is obviously unobjectionable.

The admission in evidence of the instrument signed by Yeamans on the one part, and Harris on the other, under the date of December 21st 1858, in which it was agreed that Yeamans, who was the general agent of the Hampshire and Hampden Railroad Company, might be present at the meeting of Harris and Ashburner to determine the questions submitted to them, and might point out such items in the bills of expenses as he considered unnecessary or unreasonable, and that the consent of Harris to act with Ashburner should not be construed as an acknowledgment by Harris of the validity of the contracts, but that if they should turn out to be valid, the bills passed upon by Harris and Ashburner should not again be questioned by the Hampshire and Hampden Railroad Company, seems to be wholly unimportant, as it did not affect the rights of the parties, either as to what was necessary or reasonable to be done in the execution of their previous contract, or as to what would be a reasonable expense to be incurred in the performance of it. Yeamans

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might properly point out any item of expense which he thought objectionable; but the question of its allowance was still left to be decided by the referees.

No sufficient reason is assigned for setting aside or disregarding the determination of Ashburner and Harris upon the questions submitted to them. It is said by the defendant to have been premature, because the plaintiffs had not done everything which they had stipulated for in one or the other of the two contracts entered into on the 20th of March 1858. The only failure or omission on their part in this respect, which has been suggested, is, that they had not caused "the old passenger-house to be removed from ten to twenty feet," as they had agreed to do. Now if the court erred, as is insisted by the defendant, in ruling that the two contracts of the 20th of March were not to be treated as one agreement, (upon which we think there is no reason to express any opinion,) it affords, under the circumstances stated, no reason for disturbing the verdict. The parties had a perfect right to determine for themselves what should constitute a complete performance of their contract or contracts; and either of them might, if they should, for reasons satisfactory to themselves, think fit to do so, waive the failure or omission to conform to, or comply with, a single and particular stipulation. The parties were content to consider that the contract had been so performed, on the part of the plaintiffs, as to entitle them to have the sum due to them from the Hampshire and Hampden Railroad Company ascertained and determined. This having been done to their satisfaction, the defendant has no right under his contract to object to it. He would indeed have been equally bound if they had fairly and truly adjusted the claims of the plaintiffs, and thus agreed between themselves upon the sum which was to be paid to them. He guarantied that, however found, it should be promptly paid. *Exceptions overruled.*

N. A. Leonard & M. B. Whitney, for the defendant.

R. A. Chapman & F. Chamberlin, for the plaintiffs.

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Chester W. Chapin *vs.* Connecticut River Railroad Company.

A railroad corporation, which, under an agreement between itself and other railroad corporations whose railroads form a connecting line, settles and pays accounts monthly with that corporation only whose road adjoins its own, including therein the amounts due to the corporations whose roads lie beyond, is not liable as trustee in foreign attachment of that corporation for a sum so found due to it, and for which it is in turn liable to the other corporations under the agreement.

Scire facias against the defendants as trustees of the Vermont and Massachusetts Railroad Company.

The defendants, by Daniel L. Harris, their president, filed an answer, disclosing the following state of facts at the time of the service upon them of the original trustee process. The several railroad companies, owning connecting railroads between Springfield and St. Johnsbury, Vermont, were doing business in connection with each other under an agreement by which each company sold passenger tickets to and from intermediate points and over the entire line, and received freight for transportation over the whole or any part of the line, the total charge for which was collected either at the place of starting or at the place of destination; at the end of each month a settlement was made of the amount due to each company for the business transacted under this arrangement; but, for the sake of convenience, it was the custom for each company, having money to pay to the others, to pay to the company whose road adjoined its own, not only the amount due to that company, but also all sums belonging to the other companies beyond, and the company receiving the money retained what was due to it and forwarded the residue; accounts were kept by each company only with the companies owning the roads next adjoining on each side, and the defendants therefore kept an account with the Vermont and Massachusetts Railroad Company on the north, and credited that company with, and paid to it, not only sums due to it, but also those due to the companies owning the roads lying beyond; and no distinction was made in the

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accounts or payments between money paid to the Vermont and Massachusetts Railroad Company as belonging to it, and money paid to it as belonging to those companies. At the time in question the balance of accounts between these two companies was in favor of the defendants; but several sums of money, amounting in all to $1801.60, was due from the defendants to other companies owning roads beyond, and was, according to the above described custom of business, payable by the defendants to the Vermont and Massachusetts Railroad Company.

The plaintiff, who had been the predecessor of Harris in the office of president of the defendants, testified that he never knew of any claim being made for earnings or advance charges upon the defendants by any of the companies except those whose railroads adjoined its own, and never before the service of the trustee process heard it suggested that the amount due from time to time from the defendants was held by them in trust for the companies whose roads lay beyond; and that all amounts found due were settled and paid, without reference to the companies owning roads above or below.

The parties submitted the case to the judgment of the court upon the answer of Harris, and so much of the plaintiff's testimony as was legally admissible in evidence.

A. L. Soule, for the plaintiff.

R. A. Chapman, for the defendants.

Hoar, J.* The liability of the supposed trustee must be determined upon the answer, in connection with such facts as are proved by the plaintiffs, and which are additional to, and not conflicting with, the facts which the answer discloses. Rev. Sts. c. 109, §§ 15, 41. *Gouch* v. *Tolman*, 10 Cush. 104.

By the answer it appears that a sum of money was in the hands of the defendant, which, according to the course of business and agreement of the parties, was payable to the principal defendants in the original suit. But it also clearly appears that it was not due to them as their own property, but was to be paid to them as the earnings and property of the other railroad

* Dewey, J. did not sit in this case.

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companies who were parties to the agreement. They were to receive it only as the agents or trustees of those other companies, for the purpose of transmission to the real creditor. And there is nothing in the testimony of Chapin to control or explain this state of facts. Although it may have been the custom to pay the money directly to the agent, without distinguishing it from other payments made to that company in their own right; and although it might not have been thought or considered that the money thus paid was really the property of other parties, paid for their use and on their account; yet when it becomes important to make the distinction, and the title to the money can be plainly determined, there is no reason why the distinction should not be made. When the property of a principal can be ascertained and separated, the creditors of an agent cannot be allowed to appropriate it to the payment of their debt. *Judgment for the defendants.*

ELIPHALET TRASK *vs.* HARTFORD AND NEW HAVEN RAILROAD COMPANY.

Under the *St.* of 1840, *c.* 85, a railroad corporation is liable for injuries by fire communicated from one of its locomotive engines to machinery, tools, patterns and lumber in a building near its road, or to a fence by the side of its track.

ACTION OF TORT on *St.* 1840, *c.* 85, to recover the value of a building and the machinery, tools, patterns and lumber therein, and also of a board fence, all belonging to the plaintiff, and alleged in the declaration to have been destroyed by fire from a locomotive engine of the defendants. Trial in the superior court before *Wilkinson*, J., who signed this bill of exceptions:

"The plaintiff offered evidence tending to show that the building, which was situated near the defendants' railroad, was consumed by fire communicated from one of the locomotive engines of the defendants, and there was in it at the time a quantity of machinery, tools, patterns and lumber, which was

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also consumed; and that his fence, situated on the opposite side of the railroad, and surrounding a distinct parcel of land, not connected with the building, was also consumed.

"The defendants contended that the tools, patterns and lumber in the shop, not being connected with it permanently, but being removable, subject to change at any time, were not insurable by them; also that the fence was not insurable; and that the *St.* of 1840, *c.* 85, only made them liable to pay for such property as was insurable by them.

"The court overruled this objection, and decided that if the plaintiff proved that the property was burned in the manner stated in the declaration, the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, and the defendants except to the foregoing decision."

F. Chamberlin, for the defendants, cited *St.* 1840, *c.* 85, § 1, *Chapman* v. *Atlantic & St. Lawrence Railroad*, 37 Maine, 92; *Pratt* v. *Atlantic & St. Lawrence Railroad*, 42 Maine, 579; *Hart* v. *Western Railroad*, 13 Met. 104; Redfield on Railways, 360.

H. Morris, for the plaintiff.

Hoar, J. The objection taken by the defendants was, that the tools, patterns and lumber in the shop, and the fence, were not insurable by them; and that the *St.* of 1840, *c.* 85, only made them liable to pay for such property as was insurable by them. The judge who presided at the trial overruled the objection, and, as we think, very properly. It assumes that the property specified was not insurable by the defendants. But we can see no pretext for such an assumption. The stock and tools in a mechanic's shop are not only in their own nature insurable, but among the most common subjects of the contract of insurance. A fence is not so commonly insured, probably because its value and risk do not make insurance desirable; but it certainly can be insured, and is insurable.

Whether a just construction of the *St.* of 1840 would require any limitation of the extremely comprehensive language used to define the liability of railroad corporations created by it, this case gives us no occasion to consider. We certainly do

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not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable, in the ordinary or commercial sense of that word, to make the corporation liable. *Exceptions overruled.*

HENRY S. CADY *vs.* LESTER M. CLARK.

A., in consideration of a sum of money paid to him by B., agreed to obtain from C., and deliver to B. to be cancelled, certain promissory notes of B., which both supposed to be then held by C., but which had in fact been negotiated to other parties, who afterwards brought suits and recovered judgment thereon against B., and in one of these suits A. was summoned and charged as trustee of B. for the money paid to him by B. in consideration of their contract, and paid it on execution. *Held*, that A. was not liable to B. for a failure to obtain the notes, nor for the amount which he had paid on execution in the trustee process.

ACTION OF CONTRACT on an agreement of the defendant, in consideration of the sum of $155.75 to him paid by the plaintiff, to obtain from William P. Tenney and deliver up to the plaintiff to be cancelled two promissory notes owing from him to Tenney, and amounting to $371.62; with a count for money had and received.

At the trial in the superior court, *Rockwell*, J., upon the facts stated in the opinion, ordered a verdict for the defendant, and the plaintiff alleged exceptions.

E. W. Bond, for the plaintiff.

R. A. Chapman & G. Wells, for the defendant, were stopped by the court.

MERRICK, J. When the contract which is stated in the declaration was made, both parties supposed and believed that the notes which were the subject of it were the property and in the possession of William P. Tenney. It turned out afterwards that this was a mistake; that the notes, though originally belonging and payable to him, had been previously to that time duly negotiated, and he had then no interest in them. The express object and purpose of the parties to the contract was thereby to cancel and extinguish the indebtedness of the plaintiff to Tenney; but as no such indebtedness existed, there was

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nothing upon which their contract could operate Consequently it wholly and entirely failed, and no action can be maintained against the defendant for any supposed failure on his part to perform it.

The money which was paid by the plaintiff was recoverable by him on demand as soon as it was discovered that the contract was entirely invalid, because it had been entered into upon the mistake of fact above mentioned. It could have been recovered in this action, had it not been withdrawn from the defendant's hands and legally appropriated to the plaintiff's use under the proceedings in the suit against him, in which the present defendant was summoned as his trustee. He was thus compelled to pay it to one of the plaintiff's creditors, and in that manner was discharged from any liability to the plaintiff himself. Rev. Sts. *c.* 109, § 47. *Exceptions overruled.*

GEORGE FEARING *vs.* LEONARD CLARK.

If a promissory note, which, before delivery, is deposited by the maker to be delivered to the payee only upon the happening of a certain contingency, is delivered to the payee without the knowledge or consent of the maker and without the happening of the contingency, and is by him transferred for value before maturity to a person, who takes it without notice of the special circumstances under which it came into the possession of the payee, such innocent holder for value may enforce payment of the note against the maker.

ACTION OF CONTRACT on a promissory note for $600, made by the defendant, dated July 4th, 1857, and payable in one year after date to the order of one Joseph Lambrite and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on; but admitted that he signed such a note; and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen; and that neither the defendant nor those parties, nor any one else, by his authority or consent, ever delivered the writing to Lambrite, or to any other person as the defendant's promissory note.

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At the trial in the superior court, the plaintiff proved the signatures of the maker and indorser; and there was evidence that, on the 16th of July 1857, the note was in Lambert's possession and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of $ 2000, of which $ 900 was still due from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it had been given.

Rockwell, J. allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defence to the action unless proved to have been known to the plaintiff when he took the note; and instructed the jury, "that if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained possession of it without the assent or knowledge of or authority from the defendant, and, having obtained such possession without right or authority, put his name upon the back of it, and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. M. Stebbins, for the plaintiff.

F. Chamberlin, for the defendant, cited *Churchill* v. *Gardner*, 7 T. R. 596; *Marston* v. *Allen*, 8 M. & W. 504; *Agawam Bank* v. *Strever*, 18 N. Y. 507; *Wheelwright* v. *Wheelwright*, 2 Mass. 452; *Bodwell* v. *Webster*, 13 Pick. 414; Story on Bills, § 203.

Bigelow, C. J. The defendant proved no facts at the trial which constituted a valid defence to the note declared on as against the plaintiff, who is a *bona fide* holder for value without notice. The rule is well settled, that when a note is transferred by a party to whom it is entrusted without authority or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of

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the payee or agent of the maker who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come. Chit. Bills, (10th ed.) 198. *Sweetser* v. *French*, 2 Cush. 309. It is undoubtedly true that, as between the original parties to a note or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of *Putnam* v. *Sullivan*, 4 Mass. 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practised on him, or by a voluntary violation of the trust reposed in him, must be deemed in law, as against a *bona fide* holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value without notice. *Exceptions sustained.*

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Jabin B. Williams v. Philemon F. Robbins & another.

A promissory note, in which no principal is mentioned, and signed "A. B., Ag't.," binds A. B. only, and will not support an action against any other person.

A partnership of dealers in furniture in one place owned a manufactory in another, at which the business was conducted by A. B. under the name of "A. B., Ag't." The agent gave a note, so signed, for goods delivered to the workmen there upon his order *Held*, that an action could not be sustained thereon against the partnership by evidence that in a previous instance for a similar claim such a note had been given to the same person, and, not being paid at maturity, had been presented to the partnership, who at first declined to pay or give their own note for it; but, on being asked if they repudiated the agent's transactions, said that they did not, but wished to keep the business at the manufactory separate from their other business, and that he might go to the place where the manufactory was and secure himself there; but finally gave their note instead of the other, and subsequently paid it; and that on other occasions the partners said that they would settle or be responsible for all claims for anything that went into their business at that place.

Action of contract by an indorsee upon this promissory note: "$300, Huntington, Mass. 15th July 1858. Four months after date I promise to pay to the order of Bartlett & Williams three hundred dollars, payable at Agawam Bank, Springfield, value received. A. Copeland, Ag't."

At the trial in the superior court, it appeared that the defendants, as copartners under the name of Robbins & Winship, were dealers in furniture at Hartford in the State of Connecticut; that about the 1st of January 1857 they became the owners of an establishment for the manufacture of bedsteads at Huntington, consisting of a mill or shop, with the machinery, tools, lumber and other property, at which from twelve to twenty workmen were employed, and the business was conducted by Alfred Copeland under the name of "A. Copeland, Ag't."

One of the payees testified "that the consideration of the note was goods delivered by the firm of Bartlett & Williams to the workmen in said manufactory upon the order or authority of said A. Copeland as agent in said establishment; that the account accrued and was settled by said agent, early in 1857, by a note similar to the one in suit, which, not being paid at maturity, was renewed from time to time, it having been understood and agreed between them that the same should be

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so renewed and extended, if it should be desired; that the note in suit was the last renewal thereof, and had never been paid; that a previous account due to Bartlett & Williams for goods furnished in the same manner had been settled with them by A. Copeland as agent in February 1857, by a note similar to the one in suit, which was not paid at maturity; that the witness went to Hartford, presented the note to Robbins & Winship and asked them to pay it or give their note for it; that they objected to doing so; that the witness asked them if they repudiated Copeland's transactions; that they replied they did not, but they desired that the Huntington business should take care of itself and pay its own bills, they wished to keep it separate from the business of Robbins & Winship at Hartford, that there was ten thousand dollars' worth of property at Huntington and he might go and secure himself there; that the witness replied that he preferred to have their note, and, if they would give it to him, he would extend it for them, if it should not be convenient for them to pay it at maturity; that they accordingly gave him their note and took up the other, and subsequently paid the note which they so gave him; that after the death of A. Copeland the witness sent to Robbins & Winship by mail a statement of account then due Bartlett & Williams for what had been furnished to A. Copeland, agent, including two or three items of interest or discount for the renewal of the notes, as hereinbefore stated; and that subsequently this account was settled and paid in full by a son of Alfred Copeland, acting as agent or attorney of Robbins & Winship, after the decease of his father." Several witnesses testified to statements of the defendants that they would settle, or were responsible for, all claims for anything that went into their business at Huntington. Upon this testimony, and other evidence not material to the decision, *Rockwell*, J. ruled that the plaintiff could not recover, and directed a verdict for the defendants. The plaintiff alleged exceptions.

J. Wells, for the plaintiff, cited some of the cases cited in the opinion, and *Kingman* v. *Kelsie*, 3 Cush. 339; *Woodward* v *Winship*, 12 Pick. 430; *Tappan* v. *Bailey*, 4 Met. 529; *Emer*

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son v. *Providence Hat Manuf. Co.*, 12 Mass. 237; *Odiorne* v. *Maxcy*, 15 Mass. 39; *Williams* v. *Mitchell*, 17 Mass. 98; *Thayer* v. *White*, 12 Met. 343; *Kelly* v. *Lindsay*, 7 Gray, 287; *Maneely* v. *M'Gee*, 6 Mass. 143; *Johnson* v. *Johnson*, 11 Mass. 359; *Watkins* v. *Hill*, 8 Pick. 522; *Butts* v. *Dean*, 2 Met. 76; *Reed* v. *Upton*, 10 Pick. 522.

R. A. Chapman & F. Chamberlin, for the defendants.

Hoar, J. The most important question which this case presents is whether the note declared on can be considered the contract of the defendants, if it were conceded that Copeland had full authority to make it in their behalf, and that the consideration was exclusively received for their benefit.

The rule is thus stated by Mr. Justice Story: "Where upon the face of the instrument the agent signs his own name only, without referring to any principal, there he will be held personally bound, although he is known to be or avowedly acts as agent." Story on Notes, § 68. But "if it can upon the whole instrument be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." § 69.

No agency is disclosed upon the face of this note, except by the addition of the contracted form of the word "agent" to the signature of the promisor. There is nothing upon the instrument itself to indicate whose agent he was in the transaction, nor what principal, if any, he intended to make responsible.

It was said by this court in the recent case of *Fuller* v. *Hooper*, 3 Gray, 341, that "the rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument, can be shown by parol evidence." "In other simple contracts, the rule is different." And there is no adjudged case in this commonwealth, which can be regarded as conflicting with this rule, as applied to negotiable paper. The case of *Stackpole* v. *Arnold*, 11 Mass. 27, was a case in which it was early applied; and that decision has been repeatedly recognized and confirmed in subsequent cases, although the reasoning of the judge who

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gave the opinion would lead to the application of the doctrine to contracts not negotiable, which later decisions do not countenance, or even expressly exclude. *Mayhew* v. *Prince*, 11 Mass. 54. *Long* v. *Colburn*, 11 Mass. 97. *Bradlee* v. *Boston Glass Manufactory*, 16 Pick. 350. *Bedford Commercial Ins. Co.* v. *Covell*, 8 Met. 442. *Taber* v. *Cannon*, 8 Met. 460. *Fuller* v. *Hooper*, 3 Gray, 334. *Eastern Railroad* v. *Benedict*, 5 Gray, 565, 566. *Bank of British North America* v. *Hooper*, 5 Gray, 571. *Huntington* v. *Knox*, 7 Cush. 371. *Alden* v. *Pearson*, 3 Gray, 345. *Fiske* v. *Eldridge*, 12 Gray, 474.

That the English courts recognize this distinction between negotiable paper and other simple contracts appears very clearly from the observations of Lord Abinger and Baron Parke in *Beckham* v. *Drake*, 9 M. & W. 92, 96.

The same doctrine is adopted in New York, in a case in which the authorities are extensively reviewed, and in which the signature to the bill was precisely similar to that in the case at bar. *Pentz* v. *Stanton*, 10 Wend. 271. See also *De Witt* v. *Walton*, 5 Seld. 575; *Minard* v. *Mead*, 7 Wend. 68.

In the case of *Northampton Bank* v. *Pepoon*, 11 Mass. 288, the note was indorsed in blank by Simon Larned, attorney; and the court held that he being authorized thus to indorse it, the plaintiff had the right to fill up the indorsement in such a manner as to support the declaration, namely, by an indorsement in the name of the principal, who was the payee of the note.

In *Mann* v. *Chandler*, 9 Mass. 335, *Odiorne* v. *Maxcy*, 13 Mass. 178, *Ballou* v. *Talbot*, 16 Mass. 461, and *Rice* v. *Gove*, 22 Pick. 158, the name of the principal was expressed upon the face of the note.

In *Bradlee* v. *Boston Glass Manufactory*, 16 Pick. 347, and *Packard* v. *Nye*, 2 Met. 47, although in each case the party for whom the notes were given was mentioned in the body of the note, yet as the agents signed their names without any statement that they did it as agents, it was held that they were personally bound, and the principals not responsible.

In *New England Marine Ins. Co.* v. *De Wolf*, 8 Pick. 56, the

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action was upon guaranties of two promissory notes. The form of the guaranty of the first was, "By authority from J. D. I hereby guaranty the payment of this note. I. C."; and of the other, "By authority from J. D. in a letter dated," &c. "I hereby guaranty his payment of the premium," &c. "I. C." It was held that J. D. was bound as guarantor of the notes, and not I. C. Chief Justice Parker said: "We are of the opinion that the effect of the guaranty must be determined by the intention with which it was made. If Clap had authority to make the guaranty for the defendant, and the words are such as not clearly to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter will be bound." That was a case where the representative capacity appeared in the body of the guaranty, and not by anything appended to the signature; but a guaranty is not, in Massachusetts, a negotiable contract.

In *Catskill Bank* v. *Hooper*, 5 Gray, 574, the question was raised whether the drawer of a bill, by adding to his signature the words "Superintendent, Saugerties, N. Y.," could be considered as so far indicating on the face of the bill that he was acting in a representative capacity, as to charge the owner of some iron works at Saugerties, of which he had charge, and on account of which the bill was drawn; but it was not decided.

In *Paige* v. *Stone*, 10 Met. 160, it seems to have been conceded by counsel, and not discussed in the argument, that a note signed "A. F. for the assignees," was sufficiently signed to bind the persons to whom A. F. had assigned his property in trust for his creditors, or such of them as had authorized him to make the note. And Hubbard, J. says, in delivering the opinion of the court: "We think it was properly left to the jury to determine what was meant and understood by the words 'Asa Fessenden for the assignees,' and whether the defendants were the only acting assignees." But the verdict for the plaintiff was set aside upon grounds which made the point immaterial.

The cases of *Savage* v. *Rix*, 9 N. H. 263, and *Newhall* v *Dunlap*, 14 Maine, 180, are in harmony with the general current of the authorities in this commonwealth.

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It has been urged on behalf of the plaintiff, that, upon the evidence reported, the name of "A. Copeland, Ag't," might be considered as a name under which the defendants had chosen to transact business, and thus bring the case within the principle of the decision in *Melledge* v. *Boston Iron Co.* 5 Cush. 158 But on examining the evidence we think it falls far short of sustaining this position. The cases in which that doctrine has been applied have been usually cases of corporations or copartnerships, transacting their business under an artificial name, by which they were known and recognized in their dealings. If this name is also that of a natural person, competent to contract and making contracts on his own account, it requires very clear and cogent proof, where an instrument is executed by him in his own name, to show that it was not designed to be his contract.

As we are all of opinion, therefore, that the note declared on is the personal note of Copeland, and not the note of the defendants, it becomes unnecessary to consider the other objections taken to the plaintiff's claim. *Exceptions overruled.*

ELI H. PATCH *vs.* WILLIAM H. WASHBURN.

One who writes his name upon the back of a promissory note before its delivery to or indorsement by the payee is not liable as an original promisor, if, at the time of so signing his name, the intention both of himself and of the payee is that he should assume the liability of a second indorser only; and whether such was their joint intention is a question of fact for the jury. But he is so liable if the plaintiff received it in the belief that it was the valid note of the defendant, induced by the ordinary and reasonable import of the defendant's words and acts.

ACTION OF CONTRACT against the defendant as maker of a promissory note for ninety six dollars, signed by N. R. Washburn, payable to the plaintiff or order, and bearing on its back the signature of the plaintiff, followed by that of the defendant.

At the trial in the superior court, the plaintiff introduced evidence that N. R. Washburn, who was the defendant's brother,

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and was owing the plaintiff a like amount, for which the plaintiff had demanded security, brought him this note with the defendant's name upon it, and the plaintiff discounted it at a bank, and wrote his own name over the defendant's by direction of the cashier; and that the note, not being paid at maturity, was taken up and paid by the plaintiff. The defendant introduced evidence that he indorsed the note at the plaintiff's request, and solely for his accommodation, in order to enable him to get it discounted.

Rockwell, J. submitted the case to the jury with instructions which are stated in the opinion, the verdict was for the plaintiff, and the defendant alleged exceptions.

E. D. Beach, for the defendant.

H. Morris & C. A. Winchester, for the plaintiff.

Hoar, J. The verdict must be set aside and a new trial granted, not on the ground that the evidence offered by the plaintiff would not support a verdict in his favor, if believed by the jury; but because the rule of law, under which the plaintiff claimed to recover, and which was sustained by the court, is not the true rule applicable to the question before the jury.

The claim of the plaintiff in his argument is reported to have been, "that no matter what may have been the plaintiff's design in procuring the defendant's indorsement of this note, and no matter what may have been the defendant's purpose in giving his indorsement, yet if the defendant did in fact indorse the note first in point of time, and it came into the plaintiff's hands with the defendant's indorsement upon it, that, in law, made the defendant an original promisor;" and the court instructed the jury that this claim was well founded. But the true rule is to be found in the cases of *Peirce* v. *Mann*, 17 Pick. 244, and *Clapp* v. *Rice*, 13 Gray, 403; and those decisions show that the design of the plaintiff and the purpose of the defendant in such a transaction were most material, and could be proved by parol in order to determine the legal effect of the contract.

If the note were brought to the payee, and delivered to him in payment of his debt, or as security for it, being then signed

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by the maker and having the name of the defendant indorsed upon it, with no other agreement or understanding, the note became the property of the plaintiff, and under the decisions in this commonwealth the defendant was liable as an original promisor. His liability would arise upon the note itself as thus delivered, and could not be affected by parol proof of any different intention of the defendant at the time he signed it, if this intention was not understood by the plaintiff when he received it. If, in such a case, the plaintiff through mistake innocently wrote his name above that of the defendant, without any intention to discharge the defendant from his liability, he might afterward erase his name, and the defendant, not having been prejudiced, would not be discharged.

But if, on the other hand, it was agreed between the plaintiff and the defendant that the defendant should put his name on the note as second indorser for the accommodation of the plaintiff, in order to procure a discount at the bank, and the note was handed to the plaintiff with the defendant's name upon it for the express purpose of having the plaintiff's name indorsed above that of the defendant before it should have any effect as a contract of the defendant, then, if the plaintiff indorsed his name according to the agreement, he could not afterward, by erasing it, make the defendant liable to him. The order in which the indorsers signed would not be material, provided their names were placed in the order agreed upon before the note was delivered as a valid contract. The right to erase the plaintiff's name, when once it was indorsed above the defendant's, would depend upon its having been placed there by mistake or by agreement between them. *Exceptions sustained.*

Upon a new trial in the superior court, the evidence was similar to that introduced at the first trial; *Brigham*, J. instructed the jury that if the plaintiff received this note as a valid note to himself, with the belief, induced by the ordinary and reasonable import of the words and acts of the defendant, that the defendant had put his name upon it for the purpose of giving him security for the debt of N. R. Washburn, and took

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it as such, he might recover in this action; the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which were argued by the same counsel at September term 1861.

Hoar, J. The instructions given to the jury were in conformity with the opinion and direction of this court, which were stated when the case came before us at a previous stage of the proceedings. The plaintiff's understanding of the contract, "induced by the ordinary and reasonable import of the words and acts of the defendant," was the sense in which the defendant is presumed to have intended the contract to be effectual; and in that sense it is binding upon him.

Exceptions overruled.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, AT WORCESTER,
OCTOBER TERM 1860.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. PLINY MERRICK,
HON. REUBEN A. CHAPMAN, } JUSTICES.

MEMORANDUM.

ON the twenty-eighth day of September 1860, the Honorable REUBEN ATWATER CHAPMAN, of Springfield, was appointed a justice of this court, in place of Mr. Justice BIGELOW, appointed chief justice, and took his seat upon the bench on the first day of this term.

FRANCIS MAY *vs.* SOLOMON SHUMWAY.

An inhabitant of another state, who comes into this commonwealth solely for the purpose of attending court as a witness, is privileged from arrest on civil process, although he has not been summoned nor obtained a writ of protection.

HABEAS CORPUS, upon the return of which at April term of this court in this county, it appeared that the petitioner was a

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citizen of Connecticut; that he was requested to attend as a witness in a case which stood for trial in this court at Worcester, and came into the Commonwealth and to Worcester, where the court was in session, solely for that purpose; that on reaching the court house he learned that the case would not be reached until the next week, and immediately went to the railroad station to take the cars to return home, and while in the cars was arrested on a civil process by the respondent, a deputy sheriff, and sued out this writ to try the legality of his arrest; that he had not been summoned as a witness, and had not a writ of protection. *Hoar*, J. reserved the question of law upon these facts for the determination of the full court, to whom it was submitted at April term in Hampden.

D. Foster, for the petitioner, cited *Walpole* v. *Alexander*, 3 Doug. 45; *Meekins* v. *Smith*, 1 H. Bl. 636; *Arding* v. *Flower*, 8 T. R. 534; *Ex parte Tillotson*, 1 Stark. R. 470; *Mountague* v. *Harrison*, 3 C. B. N. S. 292; *Hurst's case*, 4 Dall. 387; *United States* v. *Edme*, 9 S. & R. 150; *Norris* v. *Beach*, 2 Johns. 294; *Dixon* v. *Ely*, 4 Edw. Ch. 557; 1 Tidd Pract. 196; 2 Phil. Ev. (4th Amer. ed.) 820; 1 Greenl. Ev. § 316.

G. F. Verry, for the respondent, relied on *Ex parte M'Neil*, 6 Mass. 264.

By the Court. The protection against arrest, which the law extends to a witness, is for the benefit of parties to suits, to enable them more easily to obtain the testimony of witnesses, who might be reluctant to attend court if they were subject to arrest. A summons could not be served upon a witness residing out of the Commonwealth; and if he attends at all, his attendance is voluntary. The arrest was unlawful, and the

Petitioner must be discharged.

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Commonwealth *vs.* Patrick Clark.

It is no ground for arresting judgment in a criminal case, that in the copy of the record of the police court, in which it was commenced, attested by the clerk of that court, the complaint appears to have been certified by another person as clerk *pro tempore*, and no contingency in which the appointment of such a clerk is authorized by statute is stated.

Complaint on *St.* 1855, *c.* 215, § 24, to the police court of Milford. In the copy of the record attested by the clerk of that court, the complaint did not appear to have been certified by him, but by another person as clerk *pro tempore* of that court. The defendant, after conviction in the superior court, moved in arrest of judgment, because the record did not show the existence of any of the contingencies in which the appointment of a clerk *pro tempore* was authorized by *St.* 1857, *c.* 264. *Allen*, C. J. overruled the motion, and the defendant alleged exceptions.

F. L. King, for the defendant.

P. E. Aldrich, (District Attorney,) for the Commonwealth.

Dewey, J. There is no ground for arresting the judgment in the present case. The law authorizes the police court to appoint a clerk *pro tempore* in case of the absence or death or other disability of the permanent clerk. Although it would be entirely proper to enter upon the book of records of the police court the appointment of a clerk *pro tempore* and the occasion for making such appointment, yet that need not appear in a certificate, signed by such clerk *pro tempore*, of the copies of complaint, warrant and judgment of each case tried before that court. In the present case, the papers are in fact duly attested by the permanent clerk, and the only ground of objection is that upon the copies thus attested it appears that, in some of the preliminary proceedings before the police court, some person acted as a clerk *pro tempore*. In the record before us, duly attested by the regular clerk, we have sufficient *prima facie* evidence that there was a clerk *pro tempore* duly appointed.

Motion in arrest overruled.

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Cyrus Chenery, Administrator, *vs.* Nancy J. Davis.

An administrator who, before the death of his intestate, contracted with him for the purchase of certain real estate at a price agreed upon, took a bond for a conveyance upon payment of the purchase money, and caused it to be recorded, entered into possession, and made from time to time payments on account of interest and principal of the purchase money, has included in his inventory of the estate of the deceased the amount of the agreed price and interest remaining unpaid, and to whom the heirs are ready to convey on payment thereof, is bound to charge himself with such amount in his administration account.

Merrick, J. This is an appeal from a decree of the judge of probate, requiring the appellant to charge himself in his account of administration with the amount of his alleged indebtedness to the intestate. From the report of facts disclosed upon the trial, it appears that on the 12th of March 1846 the parties mutually contracted with each other that the intestate should sell, and that the appellant should purchase, at a stipulated price certain real estate situated in Holden in this county; and that on the same day the intestate, by his bond duly made, executed and delivered, bound and obligated himself, his heirs, executors and administrators, upon the payment of said price to him, to give and convey said estate to the appellant, who thereupon, in pursuance and performance of said contract, immediately entered upon and took possession of said real estate, and has ever since had the sole and exclusive use, occupation and enjoyment thereof. He also caused and procured the bond, thus taken by him, to be recorded in the registry of deeds for the county, and from time to time paid the interest which became due on the sum he had stipulated to pay for the estate, and also made partial payments towards and in satisfaction of the principal. By his acceptance of this bond, and by his taking possession of the estate and claiming to hold it under the contract, and by retaining possession and receiving all the rents and profits to his own use, he assumed upon himself the obligation of paying for the estate according to the terms and stipulations contained and expressed in the bond, and thereby became indebted to the intestate for the sum of money which

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the parties had mutually agreed upon as the price of the estate. Thaddeus Chenery, the obligor, afterwards died, and the appellant was duly appointed administrator of his estate, and took upon himself that trust. In discharge of the duty which thereby devolved upon him he made and filed in the probate office an inventory of the estate of the intestate, including in it as one of the debts due to him the balance of the stipulated price of said real estate, according to the terms and provisions of the bond, which then remained unpaid. This was equivalent to, and operated in law as, a payment of the debt, the amount of which became thereby assets in his hands as administrator. *Ipswich Manuf. Co.* v. *Story*, 5 Met. 313. As a consequence of this he was entitled to a specific performance of the contract made by him and Thaddeus Chenery, and could have enforced a conveyance of the said real estate to himself by a bill in equity for that purpose, if the heirs at law had upon request refused or neglected to grant and release to him their right, title and interest in it. No such proceeding need now be resorted to, because they have voluntarily by their deed duly tendered to the appellant, and filed in the clerk's office for his use and acceptance, released and quitclaimed to him all their right and interest in the estate.

It is objected by the appellant that this deed thus tendered to him by the heirs at law is not a sufficient compliance with the condition and obligation of the bond, inasmuch as it does not in terms expressly release, acquit and discharge him from all claim on their part for the rents and profits which have accrued and been received by him since the decease of the intestate. And it was suggested in the argument that they have in fact commenced and are now prosecuting a suit against him for the recovery of such rents and profits. But admitting this to be so, the objection cannot be sustained. From the time of his entering upon the estate the appellant has constantly held and occupied it in pursuance of the contract of sale and under a claim of title. This is now confirmed and perfected by a deed of conveyance from the heirs at law, whereby he has become the absolute owner of the premises in fee. The payment by

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him, on the one part, of the stipulated consideration, and the release and conveyance of the estate by them, on the other, is an entire performance of the contract, and nothing further remains to be done. No action therefore, or process of any kind, can be maintained against him by the heirs at law, either for any part of the estate, or for any portion of the rents and profits which he has received. It is a necessary consequence from this conclusion that the appellant should stand charged in his administration account with the balance of his indebtedness on account of the purchase of said estate; and the decree of the judge of probate by which this is required was correct.

Costs in cases of appeal from the court of probate are not generally allowed, but only when for special reasons it appears just and proper that they should be. We see none in the present case, and therefore no costs are to be taxed by either party.

Decree affirmed.

P. C. Bacon & E. B. Stoddard, for the appellant.

T. L. Nelson, for the appellee.

GEORGE W. ELA & others, Executors, *vs.* THOMAS EDWARDS.

The following proof was offered of the execution of a will entirely in the handwriting of the testatrix and signed by her, to which three other persons had signed their names in the usual place for the signatures of witnesses, but without any attestation clause. The person whose name came first testified as follows: "She passed me a package of papers; asked me to sign my name as a witness; told me where to sign, on the left side." The person whose name was last testified: "She said she wanted me to witness a document; that she had been making a little disposition of her effects, and would like to have me sign it as a witness. She put her finger to the line where she wished me to sign." It appeared that the person whose name was signed between the names of these two was out of the jurisdiction of the court, but had resided in the immediate neighborhood of the testatrix at the time when the will purported to have been executed, and it was also proved that the signature was genuine. *Held*, that this was sufficient proof, in the absence of any evidence or allegation of fraud, of an execution of the will in conformity with the requirements of Rev. Sts. c. 62, § 6.

It is no valid objection to a will offered for probate, that it is written on several separate pieces of paper, if the several pieces are connected in their provisions, forming a connected series, and are handed by the testator to the attesting witnesses at the time of their subscription.

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Ela & others, Executors, v. Edwards.

A will, not under seal, executed before the passage of St. 1855, c. 304, by a married woman residing in this commonwealth, is a valid disposition of personal property, the right to dispose of which by will has been reserved to her by an antenuptial indenture made between her and her husband in contemplation of marriage without the intervention of a third person as trustee; although, at the time of entering into the contract and of the marriage, the parties resided in another state, by the laws of which a disposition by will under the contract would be ineffectual unless made under seal.

Appeal from a decree of the probate court, disallowing an instrument written on seven leaves of paper and offered for probate as the last will of Susan S. Edwards. At the hearing in this court, *Hoar*, J. was of opinion that the decree should be affirmed, but reported the case for the decision of the full court, in whose opinion it is stated.

F. H. Dewey, for the appellants.

E. Mellen & L. H. Boutell, for the appellee.

Dewey, J. The question before us is, whether the evidence reported in this case sustains the burden resting on the party offering this instrument for probate, as to the proof that the same was executed in conformity with the provisions of the Rev. St. *c.* 62, § 6, requiring that it "be attested and subscribed in the presence of the testator by three or more competent witnesses."

Our own reported cases have disposed of many questions that might otherwise have been raised upon facts like those in the present case. It is not necessary that the attesting witnesses to a will should subscribe their names in the presence of each other, nor that they should see the testator sign his name, or in express terms declare the signature to be his. *Dewey* v. *Dewey*, 1 Met. 349, and cases there cited. Nor is it necessary that the witnesses should see his signature on the paper, or know from him or any other source that the instrument which they attest is his will. *Dewey* v. *Dewey*, above cited. *Hogan* v. *Grosvenor*, 10 Met. 56. *White* v. *Trustees of British Museum*, 6 Bing. 310. *Wright* v. *Wright*, 7 Bing. 457. In *Osborn* v. *Cook*, 11 Cush. 532, no one of the witnesses knew that it was a will that they were attesting. The signature of the testator may be made known to the witnesses in other modes than an express declaration to them by the testator that the signature is

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his. Any act or declaration that carries by implication an averment of such fact is equally effectual. *Nickerson* v. *Buck*, 12 Cush. 342.

In *Tilden* v. *Tilden*, 13 Gray, 110, as to one of the witnesses, only this appeared, that the testator presented the paper and said, "I wish you to witness this." He did not say anything about his signature or make any allusion to it. There was other evidence to show that the testator's name was written on the paper before this, and that the testator knew the character of the instrument.

But the case of *Hogan* v. *Grosvenor*, 10 Met. 56, in reference to one of the attesting witnesses to that will, is so exceedingly like the present in regard to the question of attestation by two of the witnesses to the present will, that it is proper to refer to it more particularly. In that, as in the present case, the will was in the handwriting of the testator. The testator there took the paper from his desk, asked the witness to sign it, and pointed out the place where he wished him to put his name. The witness did so, not knowing what the paper was, and not noticing the signature of the testator on the paper. This was held a good attestation of the will.

That case perfectly meets the case at bar as to the first and third attesting witnesses to this will. It is strikingly similar in its facts. There as here the will was in the handwriting of the testator, prepared by himself and kept in his own custody. The first witness, Hannah E. Towle, says, "She" (the testatrix) "passed me a package of papers. She asked me to sign my name as a witness, told me where to sign — on the left side." To Sarah A. Hersey, (then Sarah A. Gray,) "she said she wanted me to witness a document; that she had been making a little disposal of her effects, and would like to have me sign it as a witness. She put her finger to the line where she wished me to sign." In fact the case as to each of these witnesses is somewhat stronger than that of *Hogan* v. *Grosvenor*, as the request here was, not merely to sign it, but to "sign it as a witness." To one of these witnesses she went even much further. She expressly called it a "disposal of her effects."

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There is nothing lacking as to the proof of attestation by these two witnesses, that the law deems essential to a valid attestation of a will. The paper is in the handwriting of the testatrix and produced from her own custody. She knew what the document was, and personally solicited these witnesses to subscribe the same. The fact that she was thus obtaining the attestation of witnesses, and the directions which she gave as to signing their names, furnish strong presumptive proof that she had signed it. As was said by the court in *Dewey* v. *Dewey*, 1 Met. 354: "It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument by the requisite witnesses, would have omitted the first steps necessary to its due execution, viz. the signature by himself."

It is said in the case of *Hall* v. *Hall*, 17 Pick. 379, and other cases, that it must appear that the testator knew that it was his will which the witnesses attested. The present case falls fully within that rule. As already stated, the entire will was drawn up by the testatrix in her own handwriting, kept in her own custody, and these two witnesses procured by her personal application to them to sign the paper thus drawn up and presented to them by herself.

Unless we are prepared to overrule our own decisions, and particularly the case of *Hogan* v. *Grosvenor*, we must hold that, as to the first and third names upon this instrument, they are sufficiently shown to have been attesting witnesses to this instrument, and that they attested and subscribed the same in the presence of the testator in the manner required by law.

The further inquiry is as to Maria A. Merriam, appearing on the paper as the second name in the order of names of the three witnesses. At the hearing of this case this witness was not present. It was admitted that she was without the jurisdiction of this court, being now a resident of Davenport in the State of Iowa. It was in evidence that she was a resident in Massachusetts at the time when this will purports to have been executed, and was then living at Hayward Place, that being the same place where the testatrix resided. By competent and proper

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evidence as to her handwriting, the signature was shown to be in her own handwriting, and that such is the fact is not controverted. Do the facts thus stated, with the other evidence in the case, authorize us to find that Maria A. Merriam duly attested this instrument?

The general principle as to an attesting witness who is out of the jurisdiction of the court is that you may offer proof of his handwriting, and that being established, it is *prima facie* sufficient. *Valentine* v. *Piper*, 22 Pick. 85. *Sluby* v. *Champlin*, 4 Johns. 461. *Jackson* v. *Cody*, 9 Cow. 140. *M'Pherson* v. *Rathbone*, 11 Wend. 96. It will be seen that in such a case the admission of secondary evidence is allowed upon the same principle as if the attesting witness was dead. As to wills, if the witness be out of the jurisdiction, the same rule of admitting secondary evidence applies. *Carrington* v. *Payne*, 5 Ves. 411. *Miller* v. *Miller*, 2 Bing. N. C. 76. *Smith* v. *Jones*, 6 Rand. 33.

We suppose that this would not be controverted in the cases of wills, where the signatures of the witnesses were attached to an attesting clause, "signed, sealed, published, and declared by the above named Susan S. Edwards to be her last will and testament in the presence of us, who in her presence and in presence of each other have hereunto subscribed our names as witnesses." But in the present case no statement of this kind or any portion thereof precedes the signatures of the witnesses. Their names are found in the usual place of attesting witnesses, but without any attestation clause. Having been long accustomed to a general practice of introducing a prescribed form of an attestation clause in wills, its absence at first view strikes us as a very serious, if not fatal, omission. Yet to a great extent this form includes matters not essential to have been done, or to be proved to have been done, to entitle the will to probate. The single requirement of the statute is that the instrument "be attested and subscribed in the presence of the testator by three or more witnesses." Even as to this, though it be essential that the facts be so established by the evidence, yet neither the statute nor the decisions of the courts require that it be recited in the form of an attestation clause.

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In the early case of *Hands* v. *James*, Com. R. 531, this point came directly before the court, there being an entire omission, in the attestation clause, of what was the material fact, viz. that they had subscribed their names as witnesses in the presence of the testator. In that case the three subscribing witnesses were all dead, and the only proof that could be given was that of their handwriting, corroborated by the surrounding circumstances, if any such existed. The court held that this omission did not prevent the probate of the will, saying that it is not required by the statute that in their subscription as witnesses they should take any notice of the fact that it was done in the presence of the testator; and adding further, "In case the witnesses be dead, there cannot probably be any express proof; then, as in other cases, the proof must be circumstantial." In alluding to the circumstances, a prominent one noticed by the court was the fact that "three witnesses have set their names, and it must be intended they did it regularly." It was further said that, "if inserted, it does not conclude the parties, nor does the omission to state it conclude it was not so, and therefore must be proved by the best proof the nature of the thing will admit of."

The same question arose in a subsequent case of *Croft* v. *Pawlet*, 2 Stra. 1109, and was decided in the same way. There, the witness being dead, the jury were left to infer the fact that the attestation was in the presence of the testator, from the circumstances disclosed in the case. In *Osborn* v. *Cook*, 11 Cush. 532, where the will was sustained, the only attesting clause was "witnesses," under which the names of the subscribing witnesses were written. In the case of *Fry's Will*, 2 R. I. 88, where there was no attestation clause other than the word "witness," one of the subscribing witnesses having deceased, upon proof of the handwriting of the subscribing witness and of the testator, it was held to be the *prima facie* presumption that all the requisites of the statute had been complied with. In *Jackson* v. *Christman*, 4 Wend. 277, the court held that from the signatures of the witnesses, all the statute required might be presumed to have been complied with. In 1 Jarman on Wills,

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(4th Amer. ed.) 74, it is stated that the attestation clause is not necessary to constitute a valid attestation of a will by the subscribing witnesses. In *Roberts* v. *Phillips*, 4 El. & Bl. 450, it is said "that it never has been held that a testimonium clause is necessary, or that the witnesses should be described as witnesses; nothing more is required than that the will should be attested by the witnesses."

It seems therefore to be well established that the fact of the want of an attestation clause does not invalidate the will. It does not, in the case of the death or absence from the jurisdiction of the court of one or all the witnesses, defeat the probate of the will, but only changes the nature of the proof. Instead of its being shown by the attestation clause that there was a compliance with the statute, the court, or jury, if the case is tried by a jury, are to be reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case.

What are the circumstances in the present case? The first and leading one is, that we find a paper drawn up by the testatrix, written wholly by her own hand, purporting to be a will, and her name attached thereto, with great particularity as to her place of residence, and the time at which she executed the same, and borne thereupon in the proper place for attesting witnesses the names of three persons duly written thereon. Two of these three persons are found living within this commonwealth, and they both testify that the testatrix sought them as witnesses; that she took the paper from her own custody, asked each of these witnesses to sign as a witness, and pointed them to the proper place on the left-hand side to put their names, and had them sign their names in her presence, and she then took the paper again into her own possession. In both of these cases all was done in relation to procuring the signatures of these two witnesses by the testatrix herself. She knew the character of the instrument, because she wrote it. She knew the character of the instrument, because she told the third witness, when she requested her to sign it, "that she had been making a little disposal of her effects, and would like to have her sign it as a witness." These things are proved to have

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taken place with regard to two of the witnesses. Is there any reason to doubt that the other one also signed as a witness in her presence? The three names appear written on the will. No fraud being suggested or attempted to be shown, we are in fairness to assume that the names were written in the order they appear on the instrument. The name of Maria A. Merriam, whose attestation we are now considering, appears as the second in order. That it is in her handwriting is fully proved and not controverted. That she was at the time of the execution of this will resident in Massachusetts, and in the immediate vicinity of the testatrix, is shown. Assuming it to be true that her name was written, as it appears to be, the second on the paper, we have abundant evidence of the signature of the testatrix being on the paper at the time, from the facts in evidence as to what took place between the first witness and the testatrix — facts which, as we have shown, require us to find that the will was signed by the testatrix when the first witness attested it. All that is further required to be presumed from the surrounding circumstances is, that the second name on the paper was written thereon as an attesting witness at the request and in the presence of the testatrix. The proof of this witness being out of the jurisdiction is full. The ordinary secondary evidence is resorted to, and the proof of this being in the handwriting of the absent witness is unquestioned. We find her name there as the second of three witnesses whose names appear upon the will with the accompanying evidence as to the manner of execution by the first and third, and the further fact that the will was in the handwriting of the testatrix and always in her custody. We have, then, a strong case of *prima facie* evidence that the signature of the second witness, as well as the others, was made at the request and in the presence of the testatrix. How would it be in the ordinary case of the death of one or more of the witnesses to a will, as to supplying the proof of the execution? Could we expect to make a stronger case than is made as to the second witness, where the several witnesses had separately attested the will, as they may and often do? The obvious policy of the law, as heretofore

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declared in this commonwealth, has been that no man's will should be defeated through the want of memory on the part of the attesting witnesses to the facts essential to a good attestation; and in furtherance of the same object, every fair and reasonable intendment should be made to prevent a will from being defeated by the want of direct evidence as to the attestation, occasioned by the death or removal of the witnesses beyond the jurisdiction of this court.

In the opinion of the court, the facts in the case and the surrounding circumstances authorize the inference that this instrument was duly attested by the three witnesses.

A further objection was taken to the probate of this instrument, that it was written on several separate pieces of paper. We do not understand that this fact is fatal to the validity of the will. In the case of *Bond* v. *Seawell*, 3 Bur. 1773, all that was required was that all the separate sheets of paper must be in the room, and in the presence of the attesting witnesses. This was the view taken in *Gass* v. *Gass*, 3 Humph. 278, and in *Wikoff's Appeal*, 15 Penn. State R. 281. In the present case the different papers are obviously connected in their provisions, and are sufficiently shown to have composed a connected series, and the same that are shown to have been attested by the witnesses.

The further point was taken in behalf of the appellee that this will should not be proved and allowed, as the testatrix was a feme covert at the time of executing the will.

If the authority for making this will depended solely upon the general statute authorizing the disposition of property by will, Rev. Sts. *c.* 62, or upon the particular provisions of the *St.* of 1842, *c.* 74, or the *St.* of 1845, *c.* 208, it would be found unavailing. Nor do we perceive that the *St.* of 1855, *c.* 304, which was enacted after the execution of this will, can be construed to have a retroactive operation, and to sustain this will, which was already made.

The authority for making this will, if it exists at all, is under the rules of law applicable to antenuptial contracts. When made in pursuance of such a contract, the instrument is not

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strictly a will, but an appointment and disposition of property, which the husband, by his covenant entered into before marriage, is bound to allow. Looking at the case in this aspect, the sole inquiry is, whether by force of any antenuptial contract a power was legally reserved to the testatrix to dispose of her separate property by will. When the estate of the wife has been before marriage by a proper instrument secured to her sole use, with the power to dispose of it by will, she may undoubtedly exercise that power by a will made by her during her coverture. The authority to make such disposition of her estate does not arise under our statute of wills, but is the result of articles of agreement entered into by the parties before marriage.

In the present case, the parties in contemplation of marriage made certain articles of agreement as to the estate of Miss Ela, the female party, and as to her right to hold the same as a separate estate, and with full power in her to dispose of the same by deed or will. This instrument was under the hands and seals of the parties. The provisions are very broad, being in terms "that she shall have the full and absolute control over the said estate as if she had remained sole and unmarried, with full power to sell and dispose of the same by deed, devise or will, or otherwise." But the indenture was only between the two parties who were about to assume the relation of husband and wife, and did not introduce any third party as a trustee taking the legal title in the property, the subject of the antenuptial contract. This contract was executed in the state of New Hampshire, where the wife then resided. It was apparently in form a valid and legal antenuptial contract under the laws of New Hampshire. It is said, however, that a disposition by will would there require a sealed instrument. But the parties after marriage became residents of Massachusetts, and so continued until after the death of the wife. Upon looking at the antenuptial contract, we find that all the real estate to which it applies was situated in New Hampshire. As to that, if it has not been disposed of during the lifetime of the testatrix, the question may hereafter arise in the courts of New Hampshire We have considered the question as it arises upon the disposi

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tion of her personal estate secured to her by the antenuptial contract, and which she continued to hold as her separate estate. As to real estate, it has been a controverted point, whether any antenuptial contract made solely by the parties, without the intervention of a trustee, could be effectual to clothe the wife with the power of disposing of the same by will. But as to this, the case of *Bradish* v. *Gibbs*, 3 Johns. Ch. 523, where the whole subject was very fully considered by Chancellor Kent, is a very strong authority to the point that it is not necessary that the legal estate should be vested in a trustee, and that a mere agreement entered into before marriage by a feme sole with her intended husband, by which he stipulates that she shall have power to dispose of her real estate by will, confers upon her the power so to do. Without expressing any opinion upon that point, it is sufficient in the present case to say that it would be so in respect to her personal estate. The authorities introduced in that case, and relied upon to sustain the objection as to real estate, fully concede that such contract between the parties, without the intervention of a trustee, was good and effectual as to her personal estate. Thus in *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534, Lord Thurlow states the rule to be, that "with regard to chattels, both real and personal, the husband by contract anterior to the marriage, resting only in agreement, could authorize her to make a will; but in order to enable her to make a will of real estate, he must part with the legal estate to trustees." In *Fettiplace* v. *Gorges*, 3 Bro. C. C. 8, taking the same distinction as to real estate, it is held that with regard to the personal property her disposition is good. That a will of this character, executed by a married woman, although operating rather as an appointment or disposal of property under an antenuptial contract, may be properly the subject of a decree of the court of probate allowing the same, has been too often sanctioned to be made the subject of further question. It was so held in *Osgood* v *Breed*, 12 Mass. 525, *Holman* v. *Perry*, 4 Met. 492, and *Heath* v. *Withington*, 6 Cush. 497. In the cases cited, the court held that where a power of appointment in writing reserved to a married woman is exercised by means

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of an instrument purporting to be her last will, the same is to be proved and allowed as a will by the court of probate. These cases also furnish a precedent for a decree in a case of this character. Adopting that form, we shall order the following decree to be entered in the present case:

Ordered, that the instrument offered as the last will and testament of Susan S. Edwards be approved and allowed, and have full force and effect so far as the same can operate in law or equity upon any and all the property and rights of property of said testatrix, subject to her disposal by way of appointment, creation or declaration of trust, or otherwise, under or by virtue of the antenuptial contract made and concluded on the 21st of March 1854 between Thomas Edwards of the first part and Susan S. Ela of the second part. *Decree reversed.*

LEWIS HOLBROOK, Executor, *vs.* STEPHEN HARRINGTON & others.

A residuary bequest by a widow, "to be equally divided between the heirs of my late husband and the heirs of my brothers and sisters," gives one half to the heirs of her husband, and the other half to the heirs of her brothers and sisters, the division to be made in each case not *per capita* but by right of representation.

Under a will bequeathing a sum of money to infants, "to be kept in the hands of a trustee and paid over to the legatees upon their reaching the age of twenty years," and appointing no trustee, the executor is bound to act as such trustee.

BILL IN EQUITY, in the nature of a bill of interpleader, filed by the plaintiff as executor of the will of Elizabeth Holbrook, to obtain the direction of the court as to the construction of these two articles in her will:

"Second. I give and bequeath to Eliza, Vernon Stiles and Lucy Ellen Cook, children of Lucy Cook, collectively, thirty dollars, to be kept in the hands of a trustee and paid over to them when they shall arrive at the ages of twenty years."

"Eighth. All the residue of my property of which I may be seised and possessed at the time of my death I will to be equally divided between the heirs of my late husband Stephen Holbrook,

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and the heirs of my brothers and sisters, viz. Joseph Barnes, Peter Barnes, Nathaniel Barnes, Martha Clapp, Polly Laton, Lucy Ballard, Ann Wadsworth and Lovina Rice."

The bill alleged that the testatrix died without issue; that her husband Stephen Holbrook had nine children by a former wife, of whom the plaintiff and six others were living; one grandson living, Josiah Holbrook, son of Josiah Holbrook, deceased before the date of the will; and one granddaughter living, Angeline E. Smith, daughter of William Holbrook, deceased after the date of the will but before the testatrix; that the brothers and sisters of the testatrix had all died before the date of the will, leaving many children and grandchildren, named in the bill; that Lucy Cook died before the will was made; that of her three children, Eliza had reached the age of twenty years and the plaintiff had paid her ten dollars, Vernon Stiles had not reached the age of twenty and no trustee had been appointed for him, and Lucy Ellen died without issue, after the date of the will and before the death of the testatrix, and her share thereby lapsed. The bill prayed for a discovery, for the advice and direction of the court, and for the appointment of a trustee for Vernon Stiles Cook.

Answers were filed in behalf of several nephews and nieces of the testatrix, admitting the allegations in the bill, and claiming that the residuary bequest should be divided equally between the heirs of her husband and of her brothers and sisters *per capita*. The case was heard upon bill and answers.

P. C. Bacon & W. F. Slocum, for the plaintiff.

W. T. Harlow, for nephews and nieces of the testatrix.

METCALF, J. The court are of opinion that, by the eighth clause in Mrs. Holbrook's will, one half of the property therein mentioned is given to the heirs of her deceased husband, Stephen Holbrook, and one half to the heirs of her brothers and sisters, and that the property given to both classes of heirs is to be divided among them, not *per capita*, but by right of representation. It happens, however, that as to the heirs of her husband the result of the division by right of representation will be the same as if it were made *per capita*. The half that

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is given to those heirs is to be divided into nine equal parts, and one ninth is to be received by each of his seven children now alive, one ninth by his grandson, Josiah Holbrook, and one ninth by his granddaughter, Angeline E. Smith. Those persons who were Stephen Holbrook's heirs at the time of Mrs. Holbrook's decease are those to whom she gave one half of the residue of her property, and at that time his seven living children and two living grandchildren were his heirs. Rev. Sts. c. 61, § 1. *Daggett* v. *Slack*, 8 Met. 450. *Tillinghast* v. *Cook*, 9 Met. 148. *Childs* v. *Russell*, 11 Met. 16, 23. *Cook* v. *Catlin*, 25 Conn. 387. In the first of these cases the law was thus stated by Chief Justice Shaw: "A devise to 'heirs,' whether it be to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

If Stephen Holbrook's son William had died without issue, after the will was made, the half that was given by the will to the heirs of Stephen Holbrook would have been divided into eight parts only, namely, one eighth to his living children, and the other eighth to Josiah his grandson, who was one of his heirs, as well at the time of Mrs. Holbrook's decease as at the time when her will was made. For, when devises are made or legacies given to a class, as in this case, there is no lapse by reason of the death of either individual of the class, before the death of the testator, but the survivors take the whole. *Jackson* v. *Roberts*, 14 Gray, 546. If said William had left several children instead of one only, those children would together have been entitled to only one ninth; that is, to the same to which their father would be entitled, if he were alive; and that ninth must have been divided among them, in fractional parts thereof, according to the number of the children. So it must have been, if Josiah, the son of Stephen, had left more than one child.

The foregoing rules and principles of division are to be applied to the other half of the property which was given to the

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heirs of the brothers and sisters of the testatrix, according to the facts in the case.

As no trustee of the children of Lucy Cook is named in the second clause of Mrs. Holbrook's will, the executor (the plaintiff) is to perform the duty of trustee for her, and therefore there is no necessity for the appointment by the court of a trustee to represent Vernon Stiles Cook in this proceeding. *Hall* v. *Cushing*, 9 Pick. 395. *Dorr* v. *Wainwright*, 13 Pick. 328.

Decree accordingly.

LEONARD WOODBURY & others *vs.* FOSTER FREELAND & another.

The St. of 1855, c. 304, § 1, providing that the real and personal property of "any woman who may hereafter be married in this commonwealth," and its rents, issues and profits, shall remain her sole and separate property, applies to the case of a woman who, with her husband, have their domicil in this commonwealth at the time of their marriage, although the marriage is solemnized in another state; and satisfies a condition in a will, giving property to her upon condition that it shall not be sold, transferred or improved until the principal and income are secured to her sole use and benefit.

MERRICK, J. The demandants are the heirs at law of Zadok Woodbury, late of Sutton, in this county. By his last will and testament he bequeathed and devised all his real and personal estate, of which the demanded premises were a part, to his niece Frances Jane Woodbury, "upon condition that the property both real and personal so given and bequeathed is not to be sold, transferred or improved, without the rents and profits thereof are secured to her sole use and benefit, as well as the principal, during her natural life." The will was made on the 22d of February 1850, and was duly proved and allowed on the 7th of January 1858, the testator having died on the 7th of November 1857. Frances Jane Woodbury was married to Foster Freeland in the city of New York on the 27th of April 1858, both the parties then being residents and having their domicil in said town of Sutton. She died on the 15th of February 1859, leaving one child, who is a tenant in the present suit. Neither she nor her husband ever took any steps to secure the devised real and personal estate, or the rents, profits

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or income of either, to her sole and separate use. The demandants contend that this omission was a breach of the condition upon which the devise was made, that the real estate became thereby forfeited, and thereupon descended to them as heirs at law of the testator.

By the St. of 1855, c. 304, it is provided "that the property, both real and personal, which any woman who may hereafter be married in this commonwealth may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real and personal property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts."

The tenants contend, that by force of these provisions the real and personal estate devised to Frances Jane Woodbury was in fact and in law secured to her sole use and benefit during her natural life; and therefore that there neither was nor could have been any breach of the condition upon which the devise to her was made. And this is undoubtedly so, if, upon a proper construction of the language of the statute, it appears that she was in a situation which entitled her to the benefit of its provisions. When the law confers upon a party a right, or secures to him a benefit or privilege, in terms absolute and unconditional, he is relieved altogether from the necessity of doing any act or resorting to any means whatever to make it available to him. And since the statute declares in clear and unambiguous terms that the estate which a woman has at the time of her marriage shall, together with all the rents, issues and profits to be derived from it, continue to be her own sole and separate property, notwithstanding the marriage, and in no manner subject to the disposal of her husband, or liable to be taken by his creditors, any act done or means resorted to by her or by her husband to establish and confirm her right to the sole use and enjoyment of her property during her coverture would be entirely superfluous.

But it is objected, that Frances Jane Woodbury was not

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upon her marriage entitled to claim and hold the rights and benefits secured to married women by this statute, because the ceremony or act of marriage between her and Foster Freeland took place in the state of New York. If the words "any woman married in this commonwealth" are to be taken literally, and in their exact sense, and without regard to their import and signification when considered in their connection with the other provisions in the statute, and the particular objects and purposes manifestly intended to be accomplished by it, this objection must be allowed to prevail. But that is not the principle upon which statutes are to be interpreted; but, on the contrary, in the exposition of any enactment, the intention of the legislature is to be deduced from a view of the whole and every part of it, taken and compared together; and this intention, when accurately ascertained, is always to be received and accepted instead of the literal sense of the particular words or terms in which it is expressed. 1 Kent Com. (6th ed.) 461. *Somerset* v. *Leighton*, 12 Mass. 384. Under this rule of interpretation we can entertain no doubt that the phrase "any woman hereafter married in this commonwealth" is to be construed as extending to and including parties both of whom have their domicil and are actual inhabitants here, although the act of marriage between them is solemnized in another state, during their temporary absence from this. Such an absence is never held to affect the rights, privileges or liabilities of actual inhabitants. Their personal property continues liable to taxation, their settlement remains unchanged, the elective franchise is not lost by it. *Sackett's case*, 1 Mass. 58. *Jennison* v. *Hapgood*, 10 Pick. 77. *Athol* v. *Watertown*, 7 Pick. 42. *Otis* v. *Boston*, 12 Cush. 44. *Sears* v. *Boston*, 1 Met. 250. In the case last cited it is said by Shaw, C. J.: "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties."

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The object and purpose of the legislature in the enactment of the statute to protect the property of married women was plainly to introduce into this state a new rule, essentially different from that prevailing under the common law, for regulating and establishing the rights of all the people of this commonwealth who should, while they are resident inhabitants, contract and enter into the marital relation. This is manifest both in its general declared objects and in particular provisions contained in it. Thus in the fourth section provision is made for the mode of proceeding by the wife in the sale of her real estate or shares in incorporated companies in case of the absence of her husband from the Commonwealth. And the eighth section secures to a married woman the rights she acquired in a foreign jurisdiction if her husband shall afterwards become a resident here. The act in all its aspects was clearly intended to determine the rights which should be secured and enjoyed by the wife when both of the parties to the marriage are at the time of entering into that relation inhabitants of the Commonwealth. This great purpose of the statute cannot be set aside or rendered nugatory by the mere fact that the ceremony of marriage is observed or solemnized out of the Commonwealth during their temporary absence from it. On their return to the abode and domicil which they had never left, given up or abandoned, they respectively became entitled to the rights which are ordained and established by the statute.

The conclusion therefore must be that, upon the facts reported, Frances Jane Woodbury was, upon her marriage, entitled to claim and have all the rights and benefits secured by the provisions of the statute to the married women therein mentioned; and consequently that there was no breach of the condition upon which the demanded premises were devised to her in and by the will of Zadok Woodbury; but the same became absolutely vested in her, and at her death descended to her child, who is one of the tenants, as her heir at law.

Demandants nonsuit.

P. C. Bacon, for the demandants.

E. Mellen & W. S. Davis, for the tenants.

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Willard Holbrook *vs.* Silas A. Comstock, Administrator.

A husband who has entered into an agreement with his wife for a separation, and given a bond to a third person to secure the performance by him of the award of arbitrators appointed to determine "what allowance shall be made and paid by him to his wife by way of alimony for her support and maintenance during the existence of the coverture between them," which has since been fixed by their award at a certain sum payable quarterly, to be disposed of by the wife for the maintenance of herself and her daughters, "or otherwise as if she were a feme sole," cannot, after the death of his wife, maintain a bill in equity to restrain the obligee in the bond or his representatives from prosecuting a suit at law to recover arrears of such allowance, without alleging that she made no disposition of her property by will, and that no person has any legal or equitable claim upon her property.

Chapman, J. The plaintiff and Silas Comstock, the defendant's intestate, entered into an agreement which was put into the form of bonds given by each to the other. This agreement, and the award of the referees under it, provided for the separation of the plaintiff and his wife Alice M., who was the daughter of Silas Comstock; also for a division of property between them, and for the care, custody and maintenance of their three children, the son being placed with his father, and the two daughters with their mother. The plaintiff was indemnified against all liability for her support and for her debts; and was not to claim or intermeddle with any property which might be given or devised to her, or which she might earn or otherwise acquire; but she was to have the right to enjoy and dispose of the same, by deed, will or otherwise, as if she were a feme sole.

By the award, certain property was given to her; and the plaintiff was to pay her "fifteen dollars quarterly as long as the decision of the arbitrators should remain."

The plaintiff neglected to make the payments until a suit was brought against him, and judgment rendered thereon for the penalty of his bond on the 15th of June 1848. He then paid the arrears up to that time on execution, but has paid nothing since. His wife died on the 7th of February 1860, and the defendant as administrator of the estate of Silas Comstock, who has also deceased, is now prosecuting a suit against the plaintiff to recover the amount due to the time of her death.

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This bill in equity is brought to enjoin the defendant from the further prosecution of that suit, because, as the plaintiff alleges, the said arrears belong to him, and could only be recovered by the defendant for his use and benefit.

The ground of this claim is that these sums were to be paid to his wife as mere alimony or pin money, and that if a wife dies leaving arrears of alimony or pin money due from her husband, such arrears cannot be recovered.

Alimony is not considered to be the separate property of the wife; but it is that portion of the husband's estate which is allowed her for her present subsistence and livelihood. It is unlike property held for her sole and separate use. She ought to apply it exclusively to her support; and upon her death the arrears belong to her husband, subject only to the payment of her debts. Bishop on Marriage & Divorce, *c.* 28. *Vandergucht* v. *De Blaquiere*, 8 Sim. 315. *Clark* v. *Clark*, 6 W. & S. 85. Pin money is of the same character. 2 Story Eq. Jur. § 1375 *a*. It is for this reason that the executor of the wife cannot recover any arrears of either alimony or pin money against the husband, except for the payment of debts.

But we are of opinion that the money due upon the plaintiff's bond was not of this character. It is true that the bond provides that the arbitrators shall award and determine "what allowance shall be made and paid by the said Willard to the said Alice by way of alimony for her support and maintenance during the existence of the coverture between them." But the word "alimony" is not used in its technical signification; for what she receives is to be enjoyed by her or disposed of for the maintenance of herself and her daughters, "or otherwise as if she were a feme sole." It is therefore to be received by her rather as an annuity than as alimony or pin money.

The bill, after setting forth the marriage, the separation, the two bonds, the decease of the wife, and the pendency of the defendant's action, denies the existence of any debts against the wife, so far as the plaintiff has knowledge; and offers to give security for their payment if any exist. But it does not negative the existence of a will, and it was admitted at the argu-

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ment that the plaintiff's wife left one. Nor does it negative the existence of other legal or equitable claims upon the property. If there is a will, or if there are such claims, the court cannot, in this suit, inquire into their validity; but the plaintiff should be left to contest those matters with the persons interested in suits or proceedings to which they shall be parties. In the present suit they are not parties, and have no opportunity to be heard. *Demurrer sustained.*

P. C. Bacon, for the defendant.

D. Foster, for the plaintiff.

SILAS A. COMSTOCK, Administrator, *vs.* WILLARD HOLBROOK.

A judgment of the circuit court of the United States in a district without this commonwealth, upon a writ of *scire facias* sued out upon its own judgment in an action in which the defendant, a citizen of this commonwealth, was served with process in that district and appeared, is valid, and will support an action in this commonwealth, if the defendant had actual and reasonable notice of the writ of *scire facias*, although the only evidence returned to that court of such notice was an affidavit of service thereof on him in this commonwealth.

ACTION OF CONTRACT by the administrator of the estate of Silas Comstock, late of Burrillville in the state of Rhode Island, against Willard Holbrook, of Uxbridge in this county, upon a judgment rendered by the circuit court of the United States for the district of Rhode Island at November term 1859. In 1840 Silas Comstock recovered judgment in that court against the defendant, who had been duly served with process in Rhode Island, and appeared, in an action of debt upon a bond executed by the defendant to secure the payment by him to his wife, upon a mutual agreement between them to live apart, of such sum by way of allowance as should be awarded by certain arbitrators. See *Holbrook* v. *Comstock*, *ante*, 109. Upon that judgment execution issued for the amounts then due, which was returned satisfied; and in 1859 a writ of *scire facias* was sued out upon that judgment, for the instalments of said allowance, which had become due since 1840. The

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only return of service of the writ of *scire facias* on the defendant, or of notice to him of its pendency, was an affidavit of the marshal of that court that he had read the writ in the presence and hearing of the defendant, and delivered to him a true and attested copy of it, at his place of abode in Uxbridge. Judgment was given for the plaintiff upon the *scire facias*, and upon this judgment the present action was brought. The defendant contended that the judgment or award of damages on the *scire facias* was invalid for want of due notice to him; and that question was submitted to the decision of this court upon the case above stated.

P. C. Bacon, for the plaintiff. The circuit court of the United States in Rhode Island had jurisdiction of the original suit in which the defendant was served with process and appeared; and the *scire facias* upon its judgment therein might be served on the defendant in Massachusetts. U. S. St. 1789, *c.* 20, §§ 11, 12, 14. *Adams* v. *Rowe*, 2 Fairf. 89. 6 Dane Ab. 463. *Battey* v. *Holbrook*, 11 Gray, 212. The circuit court therefore having jurisdiction of the cause and the parties, the judgment sued on is not void, but valid and binding until reversed. *Carleton* v. *Bickford*, 13 Gray, 591. *Lane* v. *Bommelman*, 17 Ill. 95. *Walker* v. *Rogan*, 1 Wisc. 597. *Price* v. *Ward*, 1 Dutcher, 225. *Sheldon* v. *Newton*, 3 Ohio State R. 494. *Cole* v. *Conolly*, 16 Alab. 271. *Draper* v. *Bryson*, 17 Missouri, 71. It is not clear that there was any mode of service known to the common law in such a case as this, where the defendant never was an inhabitant of the realm, or that a return of *nihil* was necessary. 2 Tidd Pract. 1092. If there was, the circuit court was not bound to adopt it, but could adopt some other mode. It did adopt and accept one calculated to give, and which had given, the defendant actual notice.

D. Foster & G. W. Baldwin, for the defendant. *Scire facias* is a civil action to which the defendant may plead, and he is therefore entitled to due notice. Co. Lit. 290, 294. Bac. Ab. Scire Facias, A. *Commonwealth* v. *Stebbins*, 4 Gray, 26. *Morton* v. *Morton*, 4 Cush. 27. *Rice* v. *Talmadge*, 20 Verm. 378. By the common law practice, where the defendant in *scire*

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facias could not be found, and there was a return of *nihil* on the writ, a second *scire facias* issued and a second return of *nihil* upon it was made. 2 Tidd Pract. 1038. The same practice prevails in many courts in this country. *Dunlevy* v. *Ross*, Wright, 287. *Woodfork* v. *Bromfield*, 1 Murph. 187. *Kearns* v. *State*, 3 Blackf. 334. *Cumming* v. *Eden*, 1 Cow. 70. *M'Rae* v. *Mattoon*, 13 Pick. 53. *Kennedy* v. *People*, 15 Ill. 418. *Perkins* v. *Hume*, 10 Tex. 50. *Draper* v. *Bryson*, 17 Missouri, 71. *Knight* v. *Bunker*, 7 Ohio State R. 77. The return in this case is not equivalent to a return of *nihil;* that is to say, it does not show that the writ could not have been served upon the defendant in person within the district of Rhode Island. The circuit court passed no order for service out of that district. No process of the circuit court, in the absence of positive legislation, can be served out of its district; and no law of Rhode Island can give jurisdiction to a court of the United States. U. S. Sts. 1789, *c.* 20, § 11; 1797, *c.* 20, § 6; 1826, *c.* 124. Conkl. Pract. 91. *Ex parte Graham*, 3 Wash. C. C. 456. *Picquet* v. *Swan*, 5 Mason, 41. *Toland* v. *Sprague*, 12 Pet. 329. Such service, if ordered, would be treated as a nullity by the courts of another jurisdiction. *Ewer* v. *Coffin*, 1 Cush. 23. *Fenton* v. *Garlick*, 8 Johns. 194. If any service made in Massachusetts could be justified, it should have been made by the marshal for this district. U. S. St. 1789, *c.* 20, § 27.

Metcalf, J. The judgment of the circuit court of the United States, on which this action is brought, must be regarded as valid. That court had jurisdiction of the cause and of the parties, in the original action against the defendant, and had authority, by the laws of congress, to issue a writ of *scire facias* on the judgment in that action. The *scire facias* was not a new action, but a continuation of the old one. *Wright* v. *Nutt*, 1 T. R. 389. It was indeed necessary that notice thereof should be given to the defendant before judgment thereon could legally be rendered. But, as the law prescribed no form of notice to a defendant out of the district where the court was held, it was for the court to cause such notice to be given to him as should

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be reasonable and enable him to appear and defend his rights. The notice given to the defendant was actual, personal and seasonable, and though it was not in any form which had been ordered by the court, and was not proved by a return of an officer of the court, as such officer, but by his affidavit, yet it was adopted by the court as sufficient; and the judgment thereafter rendered must be deemed valid, and this action thereon be sustained. The circuit court could not be ousted of its jurisdiction by the absence of the defendant from the district in which the action was pending; and service of notice by any one, whose affidavit the court believed to be true, would have been as legal and effectual as that which was unofficially given by the marshal. *Judgment for the plaintiff.*

JOHN ODOM & another *vs.* REUBEN S. DENNY.

Under the Rev. Sts. c. 92, §§ 12, 13, and Gen. Sts. c. 126, §§ 13, 14, a judgment recovered in another state against joint contractors, one of whom was not served with process and did not appear, is no bar to an action against him in this commonwealth on the original contract.

ACTION OF CONTRACT commenced against Reuben S. Denny and Granville Parker. Parker was not served with process, and the plaintiffs discontinued as to him. The declaration contained a count on a judgment recovered in Virginia on certain promissory notes, and another count on the notes themselves.

The case was submitted to the decision of the superior court upon the following statement of facts: The defendants, before and at the time of making the notes, were engaged as copartners in business in the State of Virginia, of which the plaintiffs and Parker were inhabitants, but in which Denny never resided. After the dissolution of the copartnership, the plaintiffs, with knowledge of the dissolution, brought an action and recovered judgment in Virginia upon the notes against both defendants. In that action, service was made upon Parker, but no property was attached, and no service made upon Denny, or notice

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given to him, except by publication in a newspaper under an order of the court. The superior court gave judgment for the plaintiffs on the second count, and Denny appealed.

D. Foster, for the plaintiffs.

F. H. Dewey, for the defendant.

METCALF, J. The plaintiffs' counsel rightly admit that they cannot maintain against Denny the count on the judgment recovered against him and Parker in Virginia; because he had no such notice of the suit in which that judgment was rendered, as gave to the court which rendered it any jurisdiction of his person. *Bissell* v. *Briggs*, 9 Mass. 462. *Hall* v. *Williams*, 6 Pick. 232. *Ewer* v. *Coffin*, 1 Cush. 23. *Rogers* v. *Coleman*, Hardin, 413. The only question before us therefore is, whether the count on the notes can be maintained. And we are of opinion that it can be.

The Rev. Sts. *c.* 92, §§ 12, 13, and Gen. Sts. *c.* 126, §§ 13, 14, provide, first, that when, in actions on contract brought against several defendants, the writ is duly served on one or more of them, and no legal service is made on the others, the action may proceed against those who are duly served with process; and second, that if a judgment rendered against one or more of several joint contractors shall remain unsatisfied, an action on the same contract may be afterwards maintained against any of the other joint contractors, in like manner as if the contract had been joint and several. The first of these provisions ratified the decisions of the court in *Tappan* v. *Bruen*, 5 Mass. 193, and *Call* v. *Hagger*, 8 Mass. 423. The second rescinded a rule of the common law, which had been applied by the court to the case of *Ward* v. *Johnson*, 13 Mass. 148. And both provisions were held, in *Shirley* v. *Shattuck*, 13 Met. 256, to apply as well to judgments recovered in another state as to judgments recovered in this commonwealth.

In the present case, we can give no legal effect, as it respects Denny, to the judgment in Virginia, and can, at the most, regard it as valid only against Parker, and treat it as if it had been rendered against him alone; or, in the above cited statute language, as "a judgment against one of several joint contractors,"

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which, if unsatisfied, leaves the other contractor answerable in an action on the contract. Taking the judgment in Virginia to be valid against Parker, and void, in this commonwealth, as against Denny, this case is clearly within the foregoing statute provisions, and Denny is liable in this action. *A fortiori* is he so liable, if the judgment on which he rests his defence is held to be of no legal force in this commonwealth, either against him or Parker, according to the opinion given in *Hall* v. *Williams*, before referred to.

The case of *Catskill Bank* v. *Hooper*, 5 Gray, 574, does not conflict with this decision. In that case the plaintiffs had sued two persons as partners in New York, and obtained a judgment there, which under the laws of New York, bound their joint property in that state, although one of them was not served with process; and it was held, that taking such a judgment there, after the commencement of proceedings in insolvency here, against the defendant who was not served with process in New York, precluded proof of the debt against his separate estate in insolvency; the suit and judgment in New York amounting to a conclusive election to treat the two defendants as partners. *Judgment for the plaintiffs.*

VERMONT AND MASSACHUSETTS RAILROAD COMPANY *vs.* JONATHAN ORCUTT & others.

A local action against a corporation must be brought in the county in which the cause of action arises, notwithstanding the Rev. Sts. *c.* 90, § 16, *cl.* 8. — Gen. Sts. *c.* 123, § 5, *cl.* 8.

ACTION OF TORT for injuries to a culvert and railroad track of the plaintiffs by the defendants' neglect in constructing and keeping in repair a reservoir of water on a stream above the culvert. Answer to the jurisdiction, that the reservoir, culvert, water, stream, and the portion of the track injured were all in Orange in the county of Franklin. The plaintiffs demurred to the answer, and the question of law was reserved by *Hoar*, J. for the determination of the full court.

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G. T. Davis, for the plaintiffs.

C. Devens, Jr., (*G. F. Hoar* with him,) for the defendants.

METCALF, J. By the common law this is a local action. Any action founded on a local thing must be brought in the county where the cause of action arises. Com. Dig. Action, N. 5. 5 Dane Ab. 653. In other books it is said that the venue is local when the cause of action could have happened in one county only. Smith on Actions at Law, (3d ed.) 79, 102; (7th ed.) 75, 96. 15 Petersd. Ab. (Amer. ed.) 241. 1 Chit. Pl. (6th Amer. ed.) 298. Steph. Pl. 289. Gould Pl. *c.* 3, § 107. Thus, an action on the case upon the custom of England, against an innkeeper for not safely keeping the goods of his guest, is local; Clench, J. saying: "If it be an action upon the case upon a contract, or for words, and the like transitory thing, it may be brought in any county, but in this case it ought to be brought where the inn is." *Anon.* Godb. 42, and 1 Nels. Ab. 33. See also *Williams* v. *Land*, 4 Taunt. 729. So of an action for a nuisance by obstructing the navigation of a river. *Mersey & Irwell Navigation* v. *Douglas*, 2 East, 502.

The common law on this subject was held, in *Sumner* v. *Finegan*, 15 Mass. 280, and *Pitman* v. *Flint*, 10 Pick. 504, to have been altered in this commonwealth, so far as it respected actions brought before justices of the peace, by a statute which conferred jurisdiction on them. And the counsel for these plaintiffs, not denying that this action is local by the common law, seeks to sustain it in this county by virtue of a provision in the Rev. Sts. *c.* 90, § 16, (re-enacted by the Gen. Sts. *c.* 123, § 5,) that when one of the parties to an action is a corporation other than a county, town, school district or parish, "the action may be brought in any county in which such corporation shall have any established or usual place of business," &c., "or if the other party to such action is a natural person, the action may be brought in the county where such party lives." But we cannot suppose that the legislature, by this provision, intended to make any local action transitory. Section 14 of *c.* 90 directs that transitory actions, except in cases in which it is otherwise provided, shall be brought in the coun-

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ty in which one of the parties lives. Section 15 provides where an action may be brought, so far as it depends on the residence of parties, when there are two or more plaintiffs or defendants living in different counties. Section 16 is added for the purpose of providing where actions may or shall be brought, when corporations are parties; and as they cannot, like natural persons, be said to live or reside in any county, another form of expression is adopted, in order to give them a species of locality, which, in determining the county where they may sue or be sued, shall be the same as the place of living or the residence of natural persons. See *Raymond* v. *Lowell*, 6 Cush. 528, 529. We think § 16 is confined, like § 14, to transitory actions, except in cases in which it is otherwise provided; and we know of no different provision concerning actions by or against railroad corporations.

Besides, if we were of a different opinion as to the construction of § 16, it would not help the plaintiffs; for the case does not show that they have, or ever had, any established or usual place of business, &c. in the county of Worcester.

Demurrer overruled; judgment for the defendants.

RUFUS HARRIS *vs.* SAMUEL W. DOGGETT.

An action commenced before a justice of the peace, containing counts for several causes of action, of some of which he has jurisdiction, and of others not, cannot, after his judgment for the plaintiff on the first, and for the defendant on the others, and the defendant's appeal, be dismissed by the superior court for want of jurisdiction.

ACTION OF TORT, with an *ad damnum* of one hundred dollars, commenced before a justice of the peace. The declaration contained five counts, the fifth of which was for trespass on real estate, and concluded "to the damage of the plaintiff, as he says, in the sum of five dollars," and each of the other four was for a personal tort, with a similar conclusion. The justice gave judgment for the defendant on the fifth count, and for the plaintiff on each of the others, amounting in all to four dollars and

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seventy five cents. The defendant appealed to the court of common pleas. The case was transmitted under *St.* 1859, *c.* 196, to the superior court, in which the plaintiff moved to amend by striking out the fifth count, and the defendant moved to dismiss action on the ground that the justice before whom it was commenced had no jurisdiction, because it was an action of trespass upon real estate, and one in which the title to real estate might be concerned, and the damages demanded amounted to the sum of one hundred dollars. The superior court ordered the action to be dismissed, and the plaintiff appealed.

W. F. Slocum, for the defendant, cited Rev. Sts. *c.* 85, §§ 1–3; *St.* 1852, *c.* 314, § 1; *Chamberlain* v. *Cochran*, 8 Pick. 522; *Stone* v. *Kelly*, 8 Mass. 98; *Ayer* v. *Kelly*, 21 Law Reporter, 680.

H. B. Staples, for the plaintiff, cited *St.* 1852, *c.* 312, § 2; *Bishop* v. *Warner*, 22 Verm. 591; *Stanley* v. *Barker*, 25 Verm. 507; *Cook* v. *Porter*, 1 Tyler, 450; *Rich* v. *Hogeboom*, 4 Denio, 453; *Lyon* v. *Alvord*, 18 Conn. 66; *Pollard* v. *Barnes*, 2 Cush. 191.

Dewey, J. Had the declaration in the present case been confined to the fifth count, claiming damages merely for a tort for breaking and entering upon the plaintiff's close, and concluding "to the damage of the plaintiff (as he says) in the sum of one hundred dollars," the police court would have had no jurisdiction of the case, nor would the superior court have taken any on the case being brought there by an appeal. *Mc Quade* v. *O' Neil*, 15 Gray, 52.

But the present case differs very materially from that above stated. The declaration contains four counts for personal torts, as to which a justice of the peace has jurisdiction to the amount of one hundred dollars, and the *ad damnum* was very properly stated as of that amount, although by so doing the justice would not have his judicial power enlarged in reference to the counts for trespass upon the land of the plaintiff.

Under the somewhat peculiar form of the declaration in this action, adding separately to the various counts the *ad damnum*

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clause, it might be held that the justice had jurisdiction as to the fifth count, the damage being alleged in "the sum of five dollars." But however that may be, the insertion of that count does not deprive the justice of the jurisdiction of the action, or require the dismissal of the action, as the plaintiff may have leave to amend by striking out his fifth count. *Pollard* v. *Barnes*, 2 Cush. 191. That count may be waived on the trial in the superior court, and the case proceed with reference to the others, upon which only, as it was stated in the argument of the case, the plaintiff seeks to recover damages. The order of the superior court dismissing the action is reversed, and the case remitted for further proceedings.

Judgment reversed, and case remitted.

HIRAM M. BLACKMER *vs.* ISAAC S. DAVIS.

Under the Gen. Sts. *c.* 114, § 10, and *c.* 115, § 7, no appeal lies from a judgment of the superior court upon an agreed statement of facts on an answer in abatement.

REPLEVIN. Answer in abatement, that the writ was not served by an officer qualified to serve civil process. The question thus raised was submitted upon an agreed statement of facts to the superior court, which gave judgment for the defendant, and the plaintiff appealed.

S. P. Twiss, for the plaintiff. Under the Gen. Sts. *c.* 114, § 10, and *c.* 115, § 7, a judgment of the superior court upon an answer or plea in abatement, or a motion to dismiss, is final only when it is for defect of form of process.

E. B. Stoddard, for the defendant, was stopped by the court.

BIGELOW, C. J. This appeal is not rightly here. The only question presented by the statement of facts arises on a plea in abatement. By the Gen. Sts. *c.* 114, § 10, and *c.* 115, § 7, the decision of a single justice is final on all questions raised by a plea in abatement, and no appeal lies to this court. In this particular, the General Statutes have not changed the law as established by *St.* 1840, *c.* 87, § 5; but have only provided

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that motions to dismiss for defect of form in process shall stand on the same footing with pleas in abatement, and be finally determined by a justice of the court, without any right to appeal from or allege exceptions to his decision. *Willard* v. *Stone*, 13 Gray, 475. *Appeal dismissed.*

GEORGE F. VERRY *vs.* GEORGE W. SMALL & another.

Under the *St.* of 1852, *c.* 312, the defendant in replevin, under an answer denying the plaintiff's title and right of possession, may prove property in himself.

REPLEVIN of a horse, wagon and harness. Answer, 1st, not guilty; 2d, a denial of "said plaintiff's title to the said property or his right to possession as alleged;" 3d, title in the defendants under a mortgage.

At the trial in the court of common pleas, it appeared that the plaintiff, holding a second mortgage of the property, tendered to the defendants on the day of the date of the writ the amount due on their mortgage. The defendants then offered evidence that, before the date of the plaintiff's mortgage and after that of their own, the property was delivered to one of them under a verbal pledge. To the admission of this evidence, under the pleadings, the plaintiff objected. But *Mellen*, C. J. admitted it; and instructed the jury that if they found such a pledge, accompanied by possession, the plaintiff could not maintain his action. The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

D. Foster, for the plaintiff, cited *Anstice* v. *Holmes*, 3 Denio, 244; *Dickinson* v. *Lovell*, 35 N. H. 18; Co. Lit. 283 *a*; *Meany* v. *Head*, 1 Mason, 319; *Buckley* v. *Handy*, 2 Miles, 455; *Mason* v. *Farnell*, 12 M. & W. 674; *St.* 1852, *c.* 312, §§ 12, 14, 26, 34; *Granger* v. *Ilsley*, 2 Gray, 521; *Haskins* v. *Hamilton Mutual Ins. Co.* 5 Gray, 438; *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 542; *Bradford* v. *Tinkham*, 6 Gray, 495.

G. F. Hoar & E. B. Stoddard, for the defendants.

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CHAPMAN, J. The answer of the defendants contains, among other things inartificially set forth, a denial of the plaintiff's title or right of possession to the property replevied. Under this denial they offered evidence that one of the defendants had the property in his possession by virtue of a pledge made prior to the plaintiff's mortgage. This evidence was objected to, on the ground that its object was to prove "a substantive fact intended to be relied upon in avoidance of the action," and therefore it was not admissible unless the fact was "set forth in clear and precise terms" in the answer, according to the eighteenth section of the practice act, *St.* 1852, *c.* 312. But we cannot thus regard its object. It does not avoid the plaintiff's allegation, but meets it, and, if believed by the jury, overthrows it. The plaintiff has taken the burden of proving title in himself; and this evidence is pertinent to that point, for it tends to show that the title was not in him.

This question has been substantially decided in the case of *Knapp* v. *Slocomb*, 9 Gray, 73. That was an action of tort for a trespass upon real estate; under an answer averring the defendant's ignorance of the truth of the plaintiff's allegations, he offered evidence that the title to a portion of the close described in the plaintiff's declaration was in a third person and not in the plaintiff, for the purpose of disproving the plaintiff's title and possession; and the evidence was held to be admissible. The statute makes no difference in this respect between actions of tort for trespass and actions of replevin. And though it requires that each substantive fact intended to be relied on in avoidance of the action shall be set forth, yet it also provides that no party shall be required to state evidence, or disclose the means by which he intends to prove his case.

Exceptions overruled.

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Charles L. Dawson *vs.* Marshall Wetherbee.

A plaintiff in replevin, claiming title by sale from a former owner, has no ground of exception to an instruction to the jury that, if the acts and declarations relied on by him to show a sale were merely colorable and not intended to pass any title or possession to him, they might disregard them as evidence of ownership in him.

Replevin of a horse. Trial and verdict for the defendant in the superior court before *Wilkinson*, J., to whose rulings the plaintiff alleged exceptions, which are stated in the opinion.

C. H. B. Snow, for the plaintiff, cited Hilliard on Sales, 1; 1 Parsons on Con. 435 & note; Chit. Con. (8th Amer. ed.) 413 & note; *Jefferies* v. *Great Western Railway*, 5 El. & Bl. 802; *Kieran* v. *Sandars*, 6 Ad. & El. 515; *Wilson* v. *Nichols*, 29 Maine, 566; *Duncan* v. *Spear*, 11 Wend. 54.

N. Wood, for the defendant.

Merrick, J. The defendant offered to prove upon the trial that the horse, which is the subject of controversy in this action, was attached by him as a civil officer in the service of a writ against one Whittemore, who was admitted to have been the former owner of it. But upon the objection of the plaintiff the evidence offered for this purpose was held to be inadmissible, and was accordingly excluded. The question then arose, whether the plaintiff had any title to the horse. He claimed to have become the owner of it by a sale from Whittemore, and also by having had possession of it previously to the time of the alleged taking by the defendant. A verdict having been returned against the plaintiff, it is apparent that the jury must have found that he had neither the actual nor the constructive possession of the horse, for the court instructed them that if he had either he was entitled to recover.

Upon the question whether there was a sale of the horse from Whittemore to the plaintiff, the evidence produced by the parties was conflicting and contradictory. The evidence on the part of the plaintiff tended to show a sale and delivery, while that on the part of the defendant tended to prove that there had never been either a sale or delivery, and that if any forms

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of sale ever took place, they were merely colorable, and were not intended to pass the title or possession of the horse to the plaintiff. In reference to this evidence the court instructed the jury that if the acts and declarations relied on by the plaintiff to show a sale were merely colorable, and not intended to pass any title or possession to the plaintiff, the jury might disregard them as evidence of ownership in him. This instruction is objected to by the plaintiff, but it was certainly correct. It is no doubt true that if a sale of a chattel is in fact made, though it may be void as against creditors, because made with intent to hinder and delay them in the collection of their debts, or for any other fraudulent purpose, yet as between the parties the property will pass to the vendee; and a mere stranger who has himself no title cannot controvert or contest its validity. But that was not the question upon which the instructions were given. The attention of the jury was called to the question whether there had been in fact any sale at all for any purpose whatever. If the acts and declarations which were in evidence, and which were relied on at the trial by the plaintiff to show that there had been a sale, were all a mere sham and pretence, and were not intended by the parties to pass any title or possession from Whittemore to him, the court, in advising the jury that such acts and declarations might be disregarded as evidence of ownership, gave the same and all the effect to them which the parties themselves intended that they should have. And if the plaintiff did not then intend to take any title, or acquire any right or have the possession of the horse, and if no sale or transfer of the animal was intended by either of the parties to be the result of what they merely colorably said and did, he is in no situation to prefer any claim of ownership to the property. In other words, the real and substantial question submitted to the jury was, whether upon the evidence they were satisfied that there had been in fact, for any purpose whatever, honest or fraudulent, a sale of the horse. That was the real question in issue, and it was properly left to their determination. Their verdict for the defendant shows that they found that no sale had ever taken place. *Exceptions overruled.*

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Cyrus Chenery *vs.* Inhabitants of Holden.

The owner of sheep or lambs, suffering loss by reason of the worrying, maiming or killing thereof by dogs, cannot maintain an action, either of contract or of tort, against the town in which they are kept, for the omission, neglect or refusal of the selectmen to draw an order in his favor upon the town treasurer for the amount of his loss, under *St.* 1859, *c.* 225, § 6, especially if he does not allege in his declaration that he produced to the selectmen sufficient proof of his loss to establish his right to such an order.

In a demurrer which goes to the whole ground of action, the cause is sufficiently stated by alleging "that the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action."

Action of contract or tort, alleging both to be for one and the same cause of action, and containing a single count, averring that on the 1st of July 1859 the plaintiff, being the owner of a flock of twenty sheep and lambs, kept in the town of Holden, suffered loss by reason of the worrying, maiming and killing his said sheep or lambs by dog or dogs, to the amount of fifty dollars; and, within thirty days after such loss came to his knowledge, presented his claim for said loss to the board of selectmen of the town, with proof of said loss, and claimed that they should draw an order in his favor upon the treasurer of the town; but they refused and neglected to draw such an order, as by law they were obliged to do; that the plaintiff, during the year 1859, and previously to the loss of his said sheep, was the owner of a dog, and had paid into the treasury of the town the sum of one dollar for the license of his dog, according to law; that by the refusal and neglect of the selectmen to draw such an order, he was deprived of presenting the same to said treasurer, and had not been paid for his loss or damage; that the gross amount received by the town of Holden, under the provisions of the *St.* of 1859, *c.* 225, up to the 1st of January 1860, after deducting all sums previously paid out under the provisions of that act, was sufficient to pay the loss claimed by the plaintiff; and the defendants had neglected to pay said loss or damage, or any part thereof; whereby, and by reason of the provisions of said act and the law in that behalf provided, the defendants owed the plaintiff the amount of fifty dollars, for five sheep and lambs killed, and for the

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worrying and maiming of other sheep and lambs belonging to him, on the days and times aforesaid.

The defendants demurred to the declaration, "and for cause thereof say that the matters therein contained, in manner and form as therein stated and set forth, are not sufficient in law for the said plaintiff to maintain his aforesaid action against the defendants." The superior court sustained the demurrer, and the plaintiff appealed.

W. S. Davis, for the defendants.

E. B. Stoddard, for the plaintiff.

BIGELOW, C. J. The declaration sets out no facts on which this action can be maintained, either in tort or contract.

No liability is created by *St.* 1859, *c.* 225, on the part of towns, for the omission, neglect or refusal of the selectmen to perform the duties imposed on them by the provisions of that act; and none exists at common law. *Mower* v. *Leicester*, 9 Mass. 247. Besides, the declaration does not allege any breach of duty by the selectmen. There is no averment that the proof of loss or damage sustained by the plaintiff was adequate or sufficient to establish his right to an order on the treasurer. For aught that appears, the plaintiff may have failed in offering sufficient evidence to satisfy the selectmen that he had sustained any loss or damage by reason of the destruction of his sheep in the manner specified in the statute. But if he had offered such proof, it is very questionable whether any action would lie in his favor for a failure by the selectmen to draw an order on the treasurer. The power to determine on the sufficiency of the proof of loss or damage seems by the terms of the statute to be conferred exclusively on the selectmen. This power is in its nature judicial, because it vests in the selectmen a discretion to determine that the facts are proved, on which their official action is to be based. It was therefore within the scope of their jurisdiction to decide whether the plaintiff had established his claim by proof, and no action can be maintained against them or the town for the manner in which they exercised the discretion vested in them, although they may have erred in the conclusion to which they arrived. *Ela* v. *Smith*, 5 Gray, 121.

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It is hardly necessary to add, that there is nothing averred in the declaration on which an action of contract can be maintained. The statute creates no debt against the town, and no facts are stated from which an express or implied promise can be inferred.

An objection was taken to the form of the demurrer, because it does not set out the specific grounds on which the defendants rely to defeat the action. But we think it is sufficient in cases like the present, where the demurrer goes to the entire ground of action as stated in the declaration, and not to any specific defect or cause of demurrer, for the defendant to aver that the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action.

Demurrer sustained; judgment for the defendants.

JONATHAN CARY *vs.* PITT HOLMES & others.

In a suit in equity on the Rev. Sts. c. 88, § 82, by a stockholder of a manufacturing corporation who has paid a debt of the corporation, for which the stockholders are liable, to compel contribution by the other stockholders, the amount of the liability of each stockholder is to be determined by an apportionment of the debt among the shares held by solvent stockholders within the jurisdiction of the court.

BILL IN EQUITY, alleging that the plaintiff as a stockholder in a manufacturing corporation, the stockholders of which were individually liable for its debts, had paid a debt due from the corporation; that the defendants were the only solvent stockholders of the corporation within the jurisdiction of the court, although there were other stockholders, some of whom were insolvent and the rest not within the jurisdiction; and that the defendants were liable to contribute and pay to the plaintiff toward the amount paid by him, in such proportion as the number of shares held by them and him bore to the debt paid by him.

The defendants demurred, upon the ground that they were liable to contribute only such sums as would be their propor-

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tion, upon apportioning the amount, paid by the plaintiff, *pro rata* as to shares among all the stockholders of the corporation.

F. H. Dewey & H. Williams, for the defendants.

J. W. Wetherell, for the plaintiff.

CHAPMAN, J. It is held by the courts of common law in England that when one surety pays the whole debt, he may have an action against each of his co-sureties for his aliquot part of the debt, without regard to the insolvency of any of his co-sureties; and that this is the limitation of the liability of the co-sureties. *Cowell* v. *Edwards*, 2 Bos. & Pul. 268. *Browne* v. *Lee*, 6 B. & C. 689. *Batard* v. *Hawes*, 2 El. & Bl. 287. And the same doctrine is held in this state. *Brigden* v. *Cheever*, 10 Mass. 454. *Wood* v. *Leland*, 22 Pick. 503.

But in all these cases the judges admit that in chancery the doctrine is otherwise. It has been held there, from very early times, that where there are several co-sureties, and one of them pays the whole debt, his claim for contribution for the whole debt shall be against those of his co-sureties who are solvent. This is regarded as more just and reasonable than to compel him to look to his insolvent associates for their proportion of the debt. *Peter* v. *Rich*, 1 Rep. in Ch. 34. 1 Eq. Cas. Ab. 114. 1 Story Eq. Jur. § 496. In Connecticut, the courts, having chancery jurisdiction, have adopted this doctrine. *Hyde* v. *Tracy*, 2 Day, 491. In Vermont, it is held by the courts of common law. *Mills* v. *Hyde*, 19 Verm. 59. So in New Hampshire. *Henderson* v. *McDuffee*, 5 N. H. 38. It is adopted because it is said to be founded in natural equity, and because there is no court of chancery in that state. And the removal of some of the sureties from the state is held to have the same effect as if they were insolvent. *Boardman* v. *Paige*, 11 N. H. 431.

In this state, when the Rev. Sts. *c.* 70, § 16, gave a remedy for contribution between heirs, devisees, &c. by bill in equity, the court adopted the chancery doctrine; and now that the court has full equity jurisdiction, there is no reason why it should not be adopted in all suits in equity. In the case last cited, the court say: "In a suit at law, the creditor could only recover against each his aliquot part, without regard to the fact

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whether others were insolvent, or beyond the reach of process, or not. But it is clear that the legislature intended a broader and larger and more direct remedy for the creditor, throwing the risk of the absence or insolvency of some upon those who were liable; and this could be done only according to the course of proceedings in equity, where the facts of absence or insolvency can be ascertained, and the liability of the other parties established and apportioned." 22 Pick. 506.

The limited methods to which courts of law are confined in the ascertainment of facts and in the adaptation of remedies to the circumstances of such case may be regarded as a just ground for the distinction which they have established. But were it not for this difficulty, they might well have adopted the chancery doctrine; for whether the right to contribution be regarded as founded in natural equity or implied contract, it may be so extended as to make sureties mutually liable for the solvency of co-sureties as well as for the solvency of the principal.

In this case, the parties are members of a corporation, who are personally liable for its debts, under the Rev. Sts. *c.* 38, § 16, and the plaintiff alleges that he has been compelled to pay the debt for which he seeks contribution. The remedy given by the thirty-second section of that chapter against the other stockholders is by bill in equity; and the recovery must have been intended to be according to the established doctrine in equity.

It is admitted by the demurrer that the suit is against all the stockholders who are solvent and within the jurisdiction of the court. The demurrer must therefore be overruled.

Demurrer overruled.

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Francis H. Dewey *vs.* John L. Baker.

The *St.* of 1851, *c.* 315, § 8, does not authorize the levy of an execution, issued on a judgment recovered against a manufacturing corporation, on the property of an officer of the corporation, unless, if he is also a stockholder, he has been summoned and his liability established, or, if he is not a stockholder, some stockholder has been summoned and the liability of stockholders established, in the action in which such judgment was recovered.

Chapman, J.* This is an action of tort. The defendant, a deputy sheriff, having in his hands for collection an execution against the New England Coal Mining Company, levied it upon the property of the plaintiff, who was a stockholder in the corporation and one of its officers. He admits that no summons had been served upon the plaintiff, such as is required by *St.* 1851, *c.* 315, to make stockholders liable to have their property taken upon executions against a corporation, and that therefore the plaintiff was not liable merely as a stockholder to have this levy made upon his property. But he contends that the plaintiff was liable as an officer. He does not allege that the plaintiff was liable to pay the debt as an officer, on account of any such violations or neglects of duty as are mentioned in the Rev. Sts. *c.* 38, §§ 19, 23, 25, 28. And if the plaintiff had been thus liable, such liability would not have justified the defendant; it would have been necessary to bring an action of the case or a bill in equity against the plaintiff as an officer, in order to make him personally liable, as provided by §§ 29, 30, 31. Upon an execution against a corporation for a debt, the Revised Statutes did not make officers, as such, liable to have their property levied upon. Stockholders, as such, were liable in case certain provisions of the statute had not been complied with.

But this provision as to the liability of stockholders was loose, and did not afford them sufficient protection, and the *St.* of 1851, *c.* 315, was enacted to supply the defect. The first section provides that no stockholder shall be liable, unless a summons in the action is left with him. The second section permits him, when he is summoned, to appear and defend himself so far as

* Dewey, J. did not sit in this case.

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his personal liability is concerned; and provides for an execution against the corporation, with a supersedeas as to him if he prevails. The third section is the one which the defendant contends makes the plaintiff liable as an officer, although the stockholders have not been made liable by process according to the first section. This section provides that "upon any execution issued upon a judgment recovered against any corporation, the stockholders whereof are liable for its debts or any part thereof, in which a demand has been made pursuant to law, and the said execution is not satisfied, the person or property of any officer of the said corporation, at the time when the cause of action accrued, or when the said judgment was rendered, may be taken, and if no property of such officer can be found to satisfy the said execution, then the person or property of any stockholder may be taken thereon." It is agreed that there had been a failure on the part of the corporation to comply with the provisions of the Rev. Sts. *c.* 38, §§ 16, 22. So that if the stockholders had been summoned, according to the first section of the *St.* of 1851, *c.* 315, they would have been liable to have their persons or property taken on the execution which was in the defendant's hands.

The precise question which is raised in this case is, whether the property of an officer may be taken, by virtue of the third section, above mentioned, in a case where he, though a stockholder, has not been summoned. The first clause of this section uses language broad enough to make him liable, though no stockholder has been summoned; for it extends to all cases where the stockholders are liable for the debts or any part thereof; but the last clause must have been intended to control this construction, and to limit the section to cases where the liability of stockholders has been established in the case by a summons as provided in the first section; for it provides that in all cases where no property of an officer can be found, the person or property of any stockholder may be taken. But if the persons or property of stockholders can be taken, notwithstanding they have not been summoned, then the first and second sections are null and void. In order therefore to give

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a reasonable interpretation to the whole statute, it is necessary to hold that the property of an officer cannot be levied upon unless the liability of stockholders has been established in the case; or at least unless his own liability has been established, provided he is a stockholder as well as an officer. This section has already given rise to several questions, and it is to be regretted that its meaning is not more clearly expressed; for it is apparent that it still presents other questions that are not free from difficulty. *Judgment for the plaintiff.*

H. Williams, for the plaintiff.

E. Williams, (*D. Foster* with him,) for the defendant, cited *Stedman* v. *Eveleth*, 6 Met. 125; *Curtis* v. *Harlow*, 12 Met. 5; *Thayer* v. *Union Tool Co.* 4 Gray, 75; *Denny* v. *Richardson*, 4 Gray, 274; *Richmond* v. *Willis*, 13 Gray, 182.

Jared D. Sessions & another *vs.* Western Railroad Corporation.

If upon the arrival at the place of their destination of goods delivered to a railroad corporation for transportation, the agent of the owner of the goods, in the presence of the station master of the corporation, removes a portion of them from the car in which they have been transported, saying that he will come again for the rest, and some of the rest are afterwards lost from the car or from the freight-house of the corporation, it is a question for the jury, in an action by the owner of the goods against the corporation for the loss, whether the delivery to the plaintiff's agent of the portion of the goods taken by him from the car was intended by the parties for a delivery of the whole or only of the portion taken.

The liability of a railroad corporation as common carriers for goods delivered to them for transportation ceases when the goods have been taken from the car in which they have been transported to the place of destination, and stored in a freight-house of the corporation; and the corporation are thereafter liable only as warehousemen.

In an action against a railroad corporation to recover the value of goods received by them for transportation and lost, if there is any question whether the loss occurred while the liability of the defendants was that of common carriers or while it was that of warehousemen only, this question must be determined by the jury; and if the jury, on returning a verdict, in answer to an inquiry of the presiding judge, state that this question was not considered, a new trial must be ordered.

It is no part of the duty of a warehouseman to make inquiry for, or go in pursuit of, property intrusted to his keeping, after he has once ceased to have possession of it.

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MERRICK, J. In this action the plaintiffs seek to recover the value of a roll of leather lost while in the custody of the defendants. The declaration contains one count in which they are alleged to be liable for the loss as common carriers, and other counts in which they are charged with the liability in the character of warehousemen.

It appeared upon the trial that twenty three rolls of leather belonging to the plaintiffs were delivered to the defendants at Springfield, to be transported for hire thence to Brookfield; that the leather was carried to the latter place on the same day on which it was received; and that the car containing it, soon after the arrival of the train there, was run out upon a side track opposite the station. While the car was standing in that situation, the authorized agent of the plaintiffs went to it with the station agent of the defendants, and took and carried away thirteen of the twenty three rolls which were found in it, saying he would take the remaining ten which he found and left there when he next came to the station. In the afternoon of the same day, the defendants' station agent took all the rolls of leather which he at that time found in the car, and, without counting them, carried them into the freight-house. It was at a subsequent time discovered that one of the ten rolls which were left in the car when the plaintiffs' agent took away the thirteen had been lost. It has never since been received by the plaintiffs, and they now claim that the defendants are responsible to them for its value.

The defendants contended that the taking by the agent of the plaintiffs of the thirteen rolls was in legal effect a delivery of the whole parcel, and that all those which were left in the car remained there solely at the plaintiffs' risk, and without further responsibility on their part on account of them. The court properly left it to the jury to determine, upon all the evidence in the case, as a question of fact, whether the taking of the thirteen rolls was intended and understood by the parties as a delivery of the whole or only of the part taken; and instructed them that if there was then a delivery of the whole, that terminated the liability of the defendants. It is apparent from the verdict returned,

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which was for the plaintiffs, that the jury found that the whole was not delivered, but that those rolls only were delivered which were taken and carried away by the plaintiffs' agent. Of the ten rolls which remained, nine were subsequently received by the plaintiffs, and no question arises in respect to them.

In this position of the case, it becomes material and essential to determine whether the tenth or lost roll was removed by the defendants' agent from the car, and deposited in their freight or warehouse with the other nine, or was lost before there was any removal from the car of the leather which was left there by the plaintiffs' agent. It was the duty of the defendants, immediately upon the arrival of the property at its place of destination, to deliver it to the plaintiffs, or deposit it for them in their freight or warehouse. Such a deposit constitutes a constructive delivery; and if there was such a constructive delivery of this tenth roll, their responsibility as common carriers in relation to it was terminated, and their liability as warehousemen immediately thereupon commenced. *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263. If the loss occurred during the transportation, that is to say, before there had been a constructive delivery, they were liable for the value of the property absolutely upon their failure to deliver it on demand; but if it occurred after the leather had been deposited in their freight-house, and thus constructively delivered, they were not liable at all, if they used ordinary care for its safety and preservation. Thus, as their liability in different circumstances depended upon different rules and principles, and as they could not be liable in both capacities, it became indispensably necessary, before they could be charged with its value, to ascertain and determine in what relation they stood to the property at the time when the loss occurred.

Applying these principles to the fact disclosed in the answer of the jury to the inquiry proposed to them by the court when their verdict was returned, it is manifest that there has been a mistrial. The question propounded to them was, "whether they found that the leather was lost from the car, or after it was deposited in the warehouse;" to which the foreman replied, that

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"that question was not discussed." This is equivalent to saying that they did not consider or determine the question at all; their answer will admit of no other meaning or signification. And if they did not determine that question, they could not rightfully have found a verdict for the plaintiffs. To find that the defendants were liable as common carriers, they must first have found that the loss occurred from the car, that is, during the transportation and before there had been any constructive delivery; to find that they were liable as warehousemen, they must have found that the loss happened after the transportation had ceased and the goods had been constructively delivered by an actual deposit in the warehouse. But it appears from their own answer that they found neither of these facts; they did not even consider the question upon the determination of which the rights of the parties depended. It is possible, perhaps not improbable, that the unanimity required of the jury as an essential prerequisite to the rendition of a verdict was secured by a conviction in the minds of a part of the jury that the loss occurred before the liability of the defendants as common carriers ceased, and by an equal conviction in the minds of the other part that the loss occurred after the constructive delivery, in consequence of the failure to exercise due care of the property after it came into the freight-house. But, however this may have been, it is sufficient to know, in order to perceive that there has been a mistrial, that, through some kind of misapprehension, the jury failed to consider and determine a question directly involved in the issue, and upon the answer to which the rights of the parties necessarily depended.

The instructions given to the jury, in which it was stated as a rule or principle of law that the ordinary care and diligence required of warehousemen does not necessarily cease the moment the property is lost from their warehouse, but that they are bound to exercise a certain degree of reasonable care after the occurrence of the loss, cannot be sustained. The obligation of warehousemen to exercise ordinary care for the protection and safety of goods committed to their custody depends upon and is coextensive with actual and continued possession.

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If they lose that possession through any omission of the duty thus attaching to them in that relation, they are liable for all the consequences that ensue from it. On the other hand, if without fault on their part the property is taken from their possession, or lost by means for which they are not responsible, they are not required to go in pursuit of it, or to incur any expense of time, labor or money in endeavoring to discover or regain it.

For the purpose of illustrating the general principle of law laid down in the instructions, the learned chief justice of the superior court told the jury that "if the warehouseman should see or know of the property of one depositor being through mistake or otherwise carried off by another, it would be his duty to interfere to prevent it; or if he had as bailee in his possession the horse of another, and should see the animal straying from the proper inclosure, it would be his duty to take means to return the animal to its proper place." In such instances the obligation and duty of the warehouseman would undoubtedly continue in force; for in those cases the property cannot be said to be lost; nor can it be considered as abstracted wholly from the custody of the keeper, so long as he sees and knows where it is, and has the means of still asserting and maintaining his right of possession. But when it has gone beyond his reach, and he is unable to exercise any control over it, he has then already either become absolutely responsible for its value in consequence of the omission of that care which he ought to have exerted, or has been wholly exonerated because the loss has not been caused or occasioned by any fault or failure of duty which can be imputed to him. *Exceptions sustained.*

F. H. Dewey, for the defendants, cited *Schmidt* v. *Blood*, 9 Wend. 268; *Foote* v. *Storrs*, 2 Barb. 328; *Garside* v. *Trent & Mersey Navigation*, 4 T. R. 581; *Cailiff* v. *Danvers*, Peake R. 114; *Foster* v. *Essex Bank*, 17 Mass. 479; *Lichtenhein* v. *Boston & Providence Railroad*, 11 Cush. 74; *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472; *Shapleigh* v. *Wentworth*, 13 Met. 358; *Roberts* v. *Rockbottom Co.* 7 Met. 49.

P. E. Aldrich, (*P. C. Bacon* with him,) for the plaintiffs, cited

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Shurtleff v. *Williams*, 19 Pick. 209; *Farmers & Mechanics' Bank* v. *Champlain Transportation*, 23 Verm. 209; Redfield on Railways, 250, note 3; *Lichtenhein* v. *Boston & Providence Railroad*, 11 Cush. 70; *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472; *Kimball* v. *Western Railroad*, 6 Gray, 542.

CHARLES W. FREELAND & another *vs.* PRESIDENT, DIRECTORS AND COMPANY OF THE MECHANICS' BANK.

A creditor of an insolvent debtor, who has proved his claim in insolvency, has no right in his own name to contest the claims of other creditors.

BIGELOW, C. J. This petition, so far as we know, is without precedent. It is an attempt by the members of a firm, who have proved a debt against the estate of an insolvent debtor, to contest the validity of certain claims which have been proved against the same estate by the respondents, and to cause them to be expunged, under the general power conferred on this court of superintending proceedings in insolvency according to the practice of a court of equity. Without stopping to inquire whether such an application could be supported if made by a proper party, we are of opinion that the petitioners show no right to ask for the intervention of this court, in relation to the matters stated in their petition.

It is manifest from the provisions of the insolvent act in regard to the proof of debts, that it was not intended that creditors, in that right and by virtue only of the interest they might have in the distribution of the assets, should be permitted to contest the allowance of claims against the estate. This duty is devolved upon the assignee. To him only is given the right of appeal, if he is dissatisfied with the adjudication of the judge of insolvency in relation to the proof of any debt; Gen. Sts. *c.* 118, § 34; and if, before his election, any debt is presented for proof, the validity of which is doubted by the judge, the claim is to be suspended until the right of the creditor to

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its allowance can be investigated by the assignee. Gen. Sts. c. 118, § 31. The statute is framed on the theory that, in all matters pertaining to the proof of claims, the assignee is the lawful representative of the creditors, and that it is his province to see that no false, groundless or unlawful claim is allowed to share in the division of the assets. This affords ample means of protection to the rights of creditors. The presumption is that the assignee will be faithful to his trust and duly vigilant in his scrutiny of claims offered for proof. If he fails to perform his duty, he can for sufficient cause be removed from office after due proceedings had upon the application of the creditors under Gen. Sts. c. 118, § 56.

There are obvious and decisive objections against the right of creditors to maintain a petition like that now before the court. If a single creditor can bring his petition to call in question the validity of one debt duly proved and allowed, so may each and every creditor maintain a like suit in relation to every other debt. Such a course of proceeding would lead to great irregularities and confusion of rights and remedies, create a multiplicity of suits, and cause burdensome delays in the settlement and final adjustment of insolvent estates.

Demurrer sustained; petition dismissed.

F. H. Dewey & H. Williams, for the respondents.

G. W. Baldwin, for the petitioners, cited Cutler's Insolvent Law (3d ed.) 29; *Harmon* v. *Clark*, 13 Gray, 114; *Hill* v. *Hersey*, 1 Gray, 584; *Barnard* v. *Eaton*, 2 Cush. 294; *Agawam Bank* v. *Morris*, 4 Cush. 99.

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THOMAS L. NELSON & another *vs.* WILLIAM HARRINGTON.

The contract of one who places his name, waiving demand and notice, on the back of a promissory note, while in the hands of an indorsee for value, at the request of such indorsee, for a consideration moving solely from him, and without any request, express or implied, of the first indorser, is not that of a second indorser, but of a guarantor; and if, after the commencement of proceedings in insolvency against the first indorser, he pays the note, he cannot set off the amount in an action by the assignee in insolvency upon a debt due from him to the insolvent.

ACTION OF CONTRACT by the assignees in insolvency of Thomas Earle for goods sold by Earle to the defendant. The defendant admitted the debt; but claimed to set off the amount paid by him, since the commencement of the proceedings in insolvency and before the bringing of this action, upon a promissory note made by third persons, payable in six months to and indorsed by Earle, and discounted for him at the Central Bank at the time of its date, and upon the back of which the bank, while the note was their property and before its maturity or the insolvency of Earle, for a valuable consideration as between the bank and the defendant, and without Earle's knowledge or consent, procured the defendant to write his name, "waiving right to demand and notice." The case was submitted to the judgment of the court upon the facts above stated.

P. C. Bacon & T. L. Nelson, for the plaintiff.

D. Foster & G. W. Baldwin, for the defendant. The contract of the defendant, both in form and in legal effect, is that of second indorser upon the note on which Earle was first indorser, and he became liable only to the responsibilities, and entitled to all the privileges, incident to such a contract. *Hopkins* v. *Liswell*, 12 Mass. 52. *Pierce* v. *Mann*, 17 Pick. 244. *Union Bank* v. *Willis*, 8 Met. 504. *Howe* v. *Merrill*, 5 Cush. 82. *Bigelow* v. *Colton*, 13 Gray, 309. *Clapp* v. *Rice*, 13 Gray, 403. *Hall* v. *Newcomb*, 3 Hill, 233, and 7 Hill, 416. *Ellis* v. *Brown*, 6 Barb. 282. *Spies* v. *Gilmore*, 1 Comst. 321. *Durham* v. *Manrow*, 2 Comst. 548. *Greenough* v. *Smead*, 3 Ohio State R. 415. Story on Notes, § 134. Even if the contract is to be

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treated as one of guaranty, the defendant was entitled, upon payment to the holder, to his remedy on the note against all the prior parties thereto, notwithstanding they were ignorant that he had become a party to the note. *Houle* v. *Baxter*, 3 East, 177. *Hankey* v. *Smith*, 3 T. R. 507. *Phillips* v. *Astling*, 2 Taunt. 206. *Washington Bank* v. *Shurtleff*, 4 Met. 30. *Ellsworth* v. *Brewer*, 11 Pick. 316. The right of set-off depends upon general equitable principles, according to which the assignees can only recover the balance justly due after deducting every claim, of whatever nature, that the party whom they have sued would be entitled to make against the insolvent in any form or before any tribunal. *St.* 1838, *c.* 163, § 3. *Aldrich* v. *Campbell*, 4 Gray, 284. *Rose* v. *Hart*, 1 Smith Lead. Cas. & notes. Byles on Bills, *c.* 27. *Marks* v. *Barker*, 1 Wash. C. C. 178. *Hulme* v. *Muggleston*, 3 M. & W. 30. *Russell* v. *Bell*, 8 M. & W. 277. *Alsager* v. *Currie*, 12 M. & W. 751. *Bittleton* v. *Timmis*, 1 C. B. 389. *Bolland* v. *Nash*, 8 B. & C. 105. *Collins* v. *Jones*, 10 B. & C. 777.

Bigelow, C. J. We think it very clear, that the defendant's claim to set off the note now held by him against the debt due from him to the estate of the insolvent cannot be maintained. At the time of the first publication of the proceedings in insolvency, the insolvent was not indebted to the defendant, nor was there any contract then subsisting between them out of which any indebtment has since arisen. It is true that the note on its face purports to be in the hands of the defendant as indorsee; but to ascertain the legal rights of the parties in the present case, it is necessary to look behind the form of the contract into its substance.

By the facts agreed, it appears that the note, prior to the insolvency of the first indorser, had never been in the hands of the defendant, nor was it indorsed by him at the request, either express or implied, of the first indorser. On the contrary, it is agreed that it passed in the regular course of business into the possession of the Central Bank, who held it as indorsees for value prior to and at the time of the commencement of proceedings in insolvency. While they so held it, at

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their request and for a consideration moving solely from them, the defendant placed his name on the back of the note, with an agreement to waive demand and notice.

What then was the legal effect of this contract with the bank? Certainly not to make him an indorsee upon the note, in relation to the bank, or to give him the character of an indorsee towards the promisor or prior indorsers. The note had never been in his hands; no title to it was conveyed by his indorsement; there was no privity of contract subsisting between him and the first indorser. He did not, strictly speaking, become a party to the note. His contract was one of guaranty only, and he was liable solely by virtue of the separate and independent agreement which he had entered into with the bank. He had no title to the note itself, had incurred no liability upon it, and had acquired no right as against the first indorser at the time of the commencement of the insolvent proceedings.

The case is widely different in its legal effect from that which would have existed, if the defendant had been an indorser on the note, either for the accommodation of the maker, or for value in the regular course of business. Every person, who becomes a party to a negotiable note by placing his name upon it as indorser in order to pass a title to it to the holder, does so at the implied request of the maker. The contract of the promisor at the inception of the note is that he will pay its contents to any one who shall become the indorsee or holder. The law creates the duty and establishes the privity between him and every subsequent party to the bill. But this duty and privity do not extend to persons who are not in a proper sense indorsees or holders.

The defendant in the present case stood in no such relation. The bank held the note as indorsees, and his contract of guaranty was made without any request, either express or implied, from the maker or first indorser of the note. It was not until he paid the note to the bank in pursuance of his agreement, that he acquired any title to it or any right or claim under it. He then acquired only the right which the bank pre-

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viously had as indorsees, which was to prove the note against the estate of the insolvent, and receive a dividend thereon. But he obtained no such title as would enable him to go back to the inception of the note, and support a claim upon it in set-off as a debt due to him at the time of the commencement of the proceedings in insolvency.

Set-off disallowed; judgment for the plaintiffs.

WILLIAM W. RICE *vs.* JOHN P. SOUTHGATE.

The liability of a principal to indemnify his surety for any payment which the latter may be compelled to make for the former takes effect from the time when the surety agrees to become responsible for the debt of his principal, and not from the time when a payment is made; and is "a debt contracted" at the former time, within the exception in the homestead act of 1855, *c.* 238, § 3.

WRIT OF ENTRY by the tenant's assignee in insolvency to recover a lot of land in Worcester, which the tenant claimed to hold as a homestead.

The case was submitted to the judgment of the court upon the following facts: The lot was bought by the tenant in 1846, and has been since occupied by him with his family as a residence, and is worth at least two thousand dollars above a mortgage thereon. On the 16th of May 1853, the tenant, with Charles White and Eli Thayer, made a joint and several promissory note for $1000, which was paid by White on the 14th of May 1859; and on the 16th of November 1854 made a note for $1166.66, which was signed by White and Thayer as sureties, and paid, with interest, by White on the 21st of July 1859; and White proved the sums so paid, amounting to $1821.94, against the tenant's estate in insolvency

T. L. Nelson, for the demandant.

P. C. Bacon, for the tenant.

BIGELOW, C. J. The question in this case is, whether, on the facts stated, there are any debts proved against the estate of the tenant in insolvency to the amount of eight hundred dollars,

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which were contracted prior to the passage of *St.* 1855, *c.* 238, under which he claims to hold the demanded premises as a homestead. If there are, then it is clear that he cannot avail himself of the exemption secured by that statute; because by the third section it is provided that no property shall be exempted from levy on execution for a debt contracted previously to the passage of the act; and all the estate of the debtor, which might have been taken on execution against him at the time of the commencement of the proceedings in insolvency, vested in his assignee under *St.* 1838, *c.* 163, § 5. *Woods* v. *Sandford*, 9 Gray, 16.

Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. *Gibbs* v. *Bryant*, 1 Pick. 121. *Appleton* v. *Bascom*, 3 Met. 169. The same principle is adopted in our insolvent law, in which it is provided that, in case of the payment of any sum by any surety of a debtor in any contract whatsoever, the debt shall be considered as contracted at the time when the contract on which such payment has been made was originally entered into. *St.* 1838, *c.* 163, § 3. Gen. Sts. *c.* 118. § 25.

It follows that the real estate occupied by the insolvent debtor was not exempted from levy on execution at the suit of his surety who entered into the contract on which he has been held liable to an amount exceeding eight hundred dollars prior to the passage of the act under which the tenant now claims a homestead right. It therefore vests in his assignee.

Judgment for the demandant.

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Henry F. Johnson *vs.* Peter Fay.

The *St.* of 1857, *c.* 298, § 13, confirming titles to real estate, in which the wife of the grantor failed to join in releasing the right of homestead, is constitutional and valid as against the grantor.

The exception in the *St.* of 1857, *c.* 298, § 13, of rights acquired "prior to the passage of this act," does not include rights acquired after its approval by the governor and before it took effect.

Bill in equity by the assignee in insolvency of Warren Parmenter, under proceedings commenced on the 4th of June 1857, to redeem land occupied by Parmenter and his family as a homestead from 1847 until the 13th of October 1857, subject to two mortgages, in the first of which, dated October 1st 1855, to secure payment of the sum of $ 1256, his wife released all her rights of homestead, and in the second of which, dated November 10th 1856, she did not. The question whether the plaintiff could redeem without paying the amount due on the second mortgage was reserved by *Hoar*, J. for the determination of the full court.

F. H. Dewey, for the plaintiff.

H. Chapin & A. Dadmun, for the defendant.

Bigelow, C. J. It is not necessary in the present case to determine whether any homestead right exists in a right to redeem lands mortgaged to an amount exceeding eight hundred dollars, when the wife has joined with her husband in the conveyance to the mortgagee, and released her right of homestead in the premises. The validity of the mortgage which the plaintiff seeks to set aside does not depend on the decision of this question. He contends that the second mortgage on the premises is invalid upon the ground that the wife of the insolvent did not join with her husband in the deed of conveyance, according to the provisions of the *St.* of 1855, *c.* 238, § 5; and in support of this position he cites and relies on *Richards* v. *Chace*, 2 Gray, 383. But the difficulty in maintaining this proposition arises from the provision in the *St.* of 1857, *c.* 298, § 13, by which all titles to real estate in a homestead farm or

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lot, held under conveyances in which the wife failed to join, are confirmed and established, subject to the wife's right of dower and homestead thereon, "except where parties, other than the grantees in such conveyances or those claiming under them, have, prior to the passage of this act, acquired rights in said real estate, by attachments, levy on execution, descent, devise, purchase or otherwise." In the present case, the plaintiff's title accrued on the commencement of the proceedings in insolvency, June 4th 1857. The act containing the confirmatory clause above cited passed on the 30th of May, five days preceding. The second mortgage held by the defendant was thereby confirmed and rendered valid as against the plaintiff, who took his title as assignee subsequently to and with implied notice of this provision of the statute. The plaintiff does not come within the exception contained in the confirming clause, because he did not acquire his title prior to the passage of the act, by which we understand the time when it had passed through the various stages rendered necessary by the provisions of the constitution to make it a valid statute, and been approved and signed by the governor.

The right of the legislature to enact the provision, above cited, confirming titles created by conveyances of a homestead farm or lot, in which the wife did not join, was fully considered in *Wildes* v. *Van Voorhis*, 15 Gray, 139, and its validity was there recognized and affirmed.

It follows that the second mortgage is valid, and that the plaintiff is not entitled to redeem the estate, except on payment of the amount due on both mortgages with interest.

Decree accordingly.

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Luke Adams *vs.* James W. Jenkins.

A promissory note, secured by mortgage, taken since the passage of the homestead exemption acts, in exchange for a note made before those acts and not so secured, is to be presumed to be taken in payment of the first note, and is affected by those acts.

A deed executed while the *St.* of 1855, *c.* 238, was in force, executed by the grantor's wife, and containing a release of dower, but no express release of any right of homestead, and purporting to convey by metes and bounds the grantor's "homestead farm," in fact consisting of various enclosed fields situated on both sides of a road, and having upon it one dwelling-house, worth more than eight hundred dollars, occupied by the grantor and his family, and another house of much less value occupied by a man in his employ, was not executed as required by that statute to convey any part of the farm.

A deed of land exempted as a homestead, in which the grantor's wife did not join as required by the *St.* of 1855, *c.* 238, is void as against a subsequent deed from the grantor in which she duly joined before the *St.* of 1857, *c.* 298, § 18, confirmed the first deed, although the second deed excepts from the covenant against incumbrances the claims, if any, of the first grantee.

The use by the owner of a tract of land two miles and a half from his homestead farm, in connection with that farm, for pasturing cattle of himself and others, is not sufficient to exempt it from execution as part of his homestead.

Writ of entry to foreclose a mortgage made by William Robinson, Jr., to the plaintiff, on the 4th of August 1855, to secure a promissory note of the same date for $4047.83, on demand with interest, of two parcels of land; the first described as "my homestead farm, situated in the southerly part of Barre, about three miles from the common, containing about two hundred and twenty five acres;" and the second as "one other tract of land, lying in the southeasterly part of said Barre, near Smithville, so called, containing one hundred and forty acres, more or less;" and both further described by metes and bounds. The mortgage was executed by the mortgagor and his wife, and concluded as follows: "And I, Harriet N. Robinson, wife of the said William Robinson, Jr., for the consideration aforesaid, do hereby release and forever quitclaim unto the said Adams, his heirs and assigns, all right, claim or possibility of dower in said premises. In witness whereof we the said William Robinson, Jr. and Harriet N. Robinson have hereunto set our hands and seals this fourth day of August in the year of our Lord one thousand eight hundred and fifty five."

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The consideration of the note to secure which this mortgage was given was due on a promissory note given before 1851 for money lent.

The tract of land first described in the mortgage had been conveyed to the mortgagor in 1834; was situated on both sides of the town road leading from Barre to Hardwick; was one farm, consisting of various enclosed fields, separated from each other by fences and stone walls, and used for pasturing, mowing, tillage and woodland; and had upon it two dwelling-houses, besides barns and outbuildings, one of which houses was occupied by the mortgagor and his family, and exceeded in value eight hundred dollars, and the other was occupied by a workman in his employment and was of much less value.

The second tract of land described in the mortgage was situated about two miles and a half from the first, was conveyed to the mortgagor in 1848, and was used by him in connection with his said farm as a pasture for cattle of himself and others.

On the 23d of February 1857 Robinson made a mortgage to the defendant of both tracts; with a covenant against all incumbrances except the claims, if any, held by the plaintiff and two other persons; and a release, in which his wife joined, of all right of homestead.

Hoar, J., before whom the trial was had, reported the case above stated for the decision of the full court.

F. H. Dewey & E. B. Stoddard, for the plaintiff.

P. C. Bacon, for the defendant.

Bigelow, C. J. There are no facts in the case, from which it can be fairly inferred that the plaintiff's debt secured by the mortgage under which he claims to recover the premises was a debt contracted prior to the passage of the homestead act of 1855. On the contrary, by taking a new note in lieu of the former one, with a mortgage to secure its payment, it is clear that the parties intended it as a new debt, and that the old debt was intended to be extinguished and paid. It is not a case where a party having a note secured by a mortgage surrenders it and takes a new note in its place, still retaining the mortgage

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as security. There the inference is that the party did not intend to take the new note in payment, because by so doing he would give up his security and receive nothing to take its place; the inference of payment is rebutted by the circumstances; a party cannot be presumed to intend to abandon his security; the more reasonable inference therefore is that renewal of the debt, and not its payment, was the purpose which the creditor had in view. But a different presumption arises when an old debt not secured is given up, and a new note taken with a mortgage as security. In such case, the creditor may be presumed to receive the new note in payment of the old one.

The conveyance in mortgage to the plaintiff was therefore made to secure a debt contracted subsequently to the enactment of the homestead act of 1855. The wife did not join in the conveyance, except for the purpose of releasing her dower. The conveyance was therefore invalid, and conveyed no title to the plaintiff as against the defendant, to whom the estate was subsequently, and before this conveyance was confirmed by *St.* 1857, *c.* 298, § 13, conveyed by a deed in which she joined and conveyed her homestead right. This last statute expressly excepts from its operation all rights in real estate acquired by purchase or otherwise prior to its enactment. *Johnson* v. *Fay*, *ante*, 144. The provisions of *St.* 1855, *c.* 238, are substantially the same with those of *St.* 1851, *c.* 340. The only difference is that the former extends the homestead exemption from five hundred to eight hundred dollars. The decision of the court in *Richards* v. *Chace*, 2 Gray, 383, is therefore applicable, and the demandant is not entitled to recover the lot of land first described in the mortgage to him.

Sufficient facts are not stated to show that the second described parcel of land was used and occupied as part of the homestead of the mortgagor. The demandant is therefore entitled to recover possession thereof. *Judgment accordingly.*

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Isaac W. Doten *vs.* Samuel Hair.

Under the Rev. Sts. *c.* 107, § 29, a second mortgagee may maintain a writ of entry for foreclosure against the first mortgagee, who has taken possession of the premises for the like purpose, and has also obtained a conveyance of the equity of redemption from the mortgagor.

Bigelow, C. J. A consideration of the relative rights of the parties now contesting this suit, under the mortgages held by them respectively will lead to a ready solution of the question in controversy between them. The defendant is the first mortgagee, and is in actual possession and occupation of the premises under a formal entry to foreclose. He is also the owner of the right to redeem the whole estate by virtue of a deed from the original mortgagor. The plaintiff is the second mortgagee, and he brings this action for the purpose of foreclosure, and of cutting off this right of the defendant to redeem the estate from his second mortgage. What then are the rights of the respective parties? Under the first mortgage it is clear that the defendant has the right to retain possession of the estate for the purpose of foreclosing against the plaintiff's right to redeem the estate under the second mortgage. But the plaintiff cannot be cut off from his right to redeem the first mortgage at any time within three years, nor can he be compelled to redeem within a shorter period. He has also a right to foreclose against the defendant's right to redeem his second mortgage, by taking the necessary steps to accomplish that end. Now the defendant, by the purchase of the right to redeem the plaintiff's second mortgage, ought not to be permitted either to compel the plaintiff to pay his first mortgage, and thus lose the benefit which the law gives him of the right to redeem within three years; nor ought he, by keeping possession under his first mortgage, to prevent the plaintiff from foreclosing against the right to redeem the estate under the second mortgage. Equitably then the case stands thus. The defendant has the right to hold the estate under the first mortgage, for the purpose of foreclosure as against the plaintiff's second mortgage. But the plaintiff

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has the right to such possession as will enable him to foreclose as against the defendant the right to redeem his second mortgage. There is nothing inconsistent or irregular in permitting a foreclosure of both mortgages to be going on at the same time. The first mortgagee's possession operates to foreclose against the right of the second mortgagee to redeem; but at the same time the second mortgagee may have such constructive possession as will operate to foreclose against the right to redeem the estate from his mortgage. While therefore the first mortgagee is in possession, the second mortgagee may proceed to foreclose as against the holder of the right to redeem the estate, and may well maintain a suit to enable him to commence such foreclosure. Nor does it make any difference that this right to redeem is held by the first mortgagee. The possession of each will operate according to their respective rights. *Palmer* v. *Fowley*, 5 Gray, 545.

Such being the clear equitable rights of the parties, the only remaining question is, whether they can be adjusted and enforced in this suit, which is in form a writ of entry to recover possession of the premises. There would certainly be great difficulty in giving effect to a possession of the same estate by two persons at the same time, so that each should foreclose against the right of the other, according to the precedence of their respective mortgages, if the parties were limited in this proceeding to the strict rules which govern real actions at common law. But in our practice a writ of entry to foreclose a mortgage has always been considered in the nature of a bill in equity. *Penniman* v. *Hollis*, 13 Mass. 429. *Walcutt* v. *Spencer*, 14 Mass. 409. And by the Rev. Sts. *c.* 107, § 29, the court have power in such cases to make such order, decree and judgment as justice and equity may require, and to issue such process as may be necessary or proper according to the course of proceedings in chancery. This provision seems not to have been reenacted by the General Statutes, but this action was commenced before they took effect, and the right of the plaintiff to such equitable decree in the present case is secured by the Gen. Sts. *c.* 181, § 4, which provides that the repeal of the statutes

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therein revised and re-enacted shall not affect any right accrued, or any suit or proceeding had or commenced in a civil case, before the repeal took effect. The plaintiff is therefore entitled to such judgment for possession of the mortgaged premises as will enable him to foreclose against the right which the defendant has of redeeming from the second mortgage, subject to the prior right of the plaintiff to hold possession for the purpose of foreclosing the first mortgage.

Conditional judgment accordingly.

W. T. Harlow, for the plaintiff.

P. C. Bacon, for the defendant, cited *Charles* v. *Dunbar*, 4 Met. 498; *Butler* v. *Taylor*, 5 Gray, 456.

CALVIN H. RUGGLES *vs.* JOHN BARTON.

Upon the hearing before an auditor appointed to state the amount due, on a writ of entry to foreclose a mortgage, which was made at the same time with a deed from the mortgagee to the mortgagor, containing a covenant against all incumbrances except a previous mortgage, and a general covenant of warranty, the plaintiff cannot charge the defendant with a sum since paid in discharge of that mortgage, by proof of an oral agreement between them at the time of making their conveyances that the defendant should assume the payment thereof, and of a mistake of the scrivener in drawing the deeds.

DEWEY, J. This is a writ of entry to foreclose a mortgage made by the defendant to William A. Hayward, and assigned to the plaintiff by Hayward by force of a deed. The validity of this transfer of the mortgage has been already decided. *Ruggles* v. *Barton*, 13 Gray, 506. The plaintiff is entitled to his conditional judgment, and the further inquiry is as to the amount due on the mortgage.

The defendant insists that it is to be limited to the amount due on the notes secured by the mortgage, as recited in the condition thereof. The plaintiff claims, in addition thereto, that his assignor, to whose title he succeeds, had a further lien under this mortgage to secure the amount paid by him to relieve the premises from a prior outstanding mortgage thereon executed by Hayward to secure the payment of his promissory note to Samuel Allen for the sum of $390.

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Upon looking into the facts stated in the case, it appears that Hayward, while the owner in fee of the premises, made the last named mortgage, and that it was an incumbrance thereon existing at the time of making the conveyance by him to the defendant by way of a sale of the place, and in connection with which on the same day the defendant gave back the mortgage now in suit. Hayward's deed to Barton was with full covenants of warranty. The exception in the covenant against incumbrances did not affect the covenant of warranty. *Estabrook* v. *Smith*, 6 Gray, 572. The payment by Hayward of that incumbrance was therefore only in discharge of his own liability upon his warranty to Barton. It is true that Barton's subsequent mortgage has similar covenants, but they are subsequent to the deed of Hayward, and must be construed as respects Hayward in reference to the conveyance by him, and would be well maintained, if there was no breach of warranty by Hayward.

If there was nothing further in the case, it would be obviously just, as well as the legal view of the matter, that Hayward should have no claims upon this mortgage for the money paid to Allen to discharge his own note and mortgage. Indeed in so doing he would be only discharging his obligation to Barton.

But at the hearing before the auditor appointed to hear the parties and state the amounts due on the mortgage, the plaintiff proposed to introduce evidence of a verbal agreement between Hayward and Barton at the time of the execution of the deed to Barton, and of the mortgage back to Hayward, to the effect that Barton was to assume the Allen mortgage, and pay the note to Allen, and also to show that the scrivener made a mistake in not so writing the deed.

This evidence was, we think, properly rejected by the auditor. In the inquiry before the auditor, the written document must be taken as proof of the agreement of the parties. If the party alleging error or mistake in the scrivener would avail himself of it, it should have been done by a bill in equity to reform and correct such mistake, and thus present a case upon the deeds which would have made the outstanding mortgage to Allen a proper subject of payment to Hayward in the capacity of a

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mortgagee of Barton, and not as it now appears upon the written instruments, a payment in discharge of his warranty to Barton, and which he should have paid without remuneration from Barton. But such mistake of the parties must be expressly charged and put in issue, and upon strong and satisfactory proof may be corrected in that way. *Canedy* v. *Marcy*, 13 Gray, 373. This claim of the plaintiff must therefore be rejected. *Conditional judgment accordingly.*

T. G. Kent, for the plaintiff, cited *Godfrey* v. *Watson*, 3 Atk. 517; *Page* v. *Foster*, 7 N. H. 392; *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370; *Reed* v. *Reed*, 10 Pick. 400; *Sparhawk* v. *Wills*, 5 Gray, 423; *Stevens* v. *Miner*, 5 Gray, 429 note; *Walcutt* v. *Spencer*, 14 Mass. 409; *Peck* v. *Hapgood*, 10 Met. 172; *Stewart* v. *Clark*, 11 Met. 384; *Palmer* v. *Fowley*, 5 Gray, 546; *St.* 1856, *c.* 38, § 1; *Canedy* v. *Marcy*, 13 Gray, 373; Gen. Sts. *c.* 113, § 2; *Holland* v. *Cruft*, 20 Pick. 321; *Goodrich* v. *Staples*, 2 Cush. 258; *Boyden* v. *Partridge*, 2 Gray, 194; *Willie* v. *Lugg*, 2 Eden, 80; 1 Fonbl. Eq. bk. 1, *c.* 3, § 9 & note; *Carpenter* v. *Buller*, 8 M. & W. 209; Com. Dig. Estoppel, E. 4.

P. C. Bacon, for the defendant.

JAMES COOMBS *vs.* JAMES W. JENKINS & another.

Under a bond to save the grantee of land subject to a mortgage harmless from a second mortgage, and to cause it to be assigned to him within six months, a failure to cause such assignment to be made within the six months will entitle the plaintiff, even after foreclosure of the first mortgage, to maintain an action, and if the estate is not worth more than the sum of the two mortgages, to recover the difference between its value and the amount due on the first mortgage.

ACTION OF CONTRACT upon a bond executed on the 1st of April 1857, to the plaintiff and Aaron P. Small, since deceased, in the sum of three thousand dollars, the condition of which was that the defendants should save the obligees harmless from, and, within six months, cause to be assigned to them, a mort-

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gage held by Deane Towne upon lot No. 44 on Union Hill in Worcester, which had been conveyed to the obligees by Larkin Smith, free from all incumbrances except a mortgage of $1700 to Jonathan Webb.

At the trial in this court, without a jury, which was waived by the parties, the defendants admitted the execution of the bond, and that the Towne mortgage had not been assigned to the plaintiff. *Hoar*, J. ordered judgment for the penalty of the bond, and to this order the defendants alleged exceptions.

The case was then referred by agreement of parties to an assessor, the substance of whose report is stated in the opinion, and for the amount of damages found by whom execution was awarded, and the defendants alleged exceptions.

C. Devens, Jr. & G. F. Hoar, for the defendants.

D. Foster & G. W. Baldwin, for the plaintiff.

Merrick, J. The failure of the defendants to cause the mortgage for twenty five hundred dollars upon lot No. 44 on Union Hill in Worcester, held by Deane Towne, to be assigned to the plaintiff and Small within six months from the date of the bond declared on, and thereby to secure to them a good title to the estate, except as to a previous mortgage thereon to Jonathan Webb, was a breach of the condition of the bond. It is conceded that the amount due on the Towne mortgage, nominally much more, was at least equal to the entire value of the estate over and above the prior incumbrance. This rendered the redemption of the estate by the plaintiff from the second mortgage useless and unnecessary; and deprived him in fact of the whole value of the property beyond the incumbrance upon it created by the mortgage to Webb. If any loss has accrued from the omission to redeem, it resulted from the failure of the defendants to assign the Towne mortgage to the plaintiff, and thus to help them perform the condition of their bond; and it ought to be borne by the party, by whose omission and failure to perform his contract it has been occasioned. This, upon the facts reported, leads to the conclusion that the plaintiff is entitled to recover of the defendants the difference between the value of the estate and the amount due on the Webb mort-

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gage. The damages reported by the assessor were found upon that basis; and therefore the order of the court that execution should issue upon the judgment for the sum reported by him was correct. *Exceptions overruled.*

Aaron P. Small *vs.* James W. Jenkins.

Proof of an oral agreement made between the grantor and grantee, after the delivery of a deed containing covenants of warranty against all incumbrances, concerning the removal of certain existing incumbrances, is not incompetent as tending to contradict the deed.

At the trial of an action on a promissory note, there was evidence that the plaintiff had signed and delivered certain deeds of land, which the presiding judge erroneously ruled to be void, in consideration for other lands purchased by him of a third party with covenants of warranty against all incumbrances; that these lands were at the time subject to a mortgage, which the grantor undertook to get discharged, but which had not been discharged at the time of the trial; and that the plaintiff subsequently agreed orally to take the note in suit, instead of the discharge of this mortgage. The presiding judge refused to instruct the jury that there was no evidence in the case, other than the note itself, tending to show a consideration for it; and instructed them that if the note was given and accepted in satisfaction or partial satisfaction of the claim for damages on the covenant against incumbrances in the deed to the plaintiff, he might recover. *Held*, that the defendant had no ground of exception.

A deed by a tenant in common of a certain number of acres in a tract of land described as undivided, in which his share equals a larger number of acres, is a valid conveyance of the specified proportion of the whole tract.

Action of contract upon a promissory note for $1802, dated April 1st 1857, payable in one year to James Coombs or order, and by him indorsed to the plaintiff. The answer admitted the making of the note, but denied any consideration.

At the trial in the superior court before *Russell*, J. it was admitted that the note was open to the same defences as it would have been in the hands of Coombs.

Coombs testified that in November 1856, in behalf of himself and the plaintiff, he agreed to purchase of Larkin Smith a house in Worcester for $3500, to be paid for by a conveyance of seventeen hundred and fifty acres of land in the State of New York, and received from Smith a warranty deed of the same,

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containing the usual covenants; that the house conveyed by Smith was subject, at the time, to two mortgages, and it was agreed that Smith should have until the 1st, afterwards extended to the 4th, of April 1857 to get them discharged; that before the expiration of this time Smith offered to give to Coombs the defendant's note for the amount of one of the mortgages, (which with interest was equal to the note sued on,) leaving it undischarged, and that Coombs accepted the offer, and met the defendant by appointment, at Smith's office, and the defendant then signed and delivered to him this note, and he delivered to Smith deeds, signed by the plaintiff, of fourteen hundred and sixty seven "acres of land undivided, and known or distinguished as the southerly half part of township numbered eight, called Hollywood, in the county of St. Lawrence, and State of New York," which township contained a little more than fourteen thousand acres, of which the plaintiff and Coombs each owned one undivided fourth part. It also appeared that similar deeds of two hundred and eighty three more acres had been delivered to Smith.

After Coombs had testified to his receipt of the deed from Smith to himself and the plaintiff, the judge, against the defendant's objection, allowed the plaintiff to ask Coombs what arrangement, if any, was made about incumbrances upon the estate in Worcester.

The judge ruled, at the defendant's request, that the deeds of the land in New York were void, and were no consideration for the note; but refused to rule that there was no evidence in the case, other than the note itself, tending to show a consideration for it; and instructed the jury that if the note was given and accepted in satisfaction or partial satisfaction of the claim for damages on the covenant against incumbrances in Smith's deed, the plaintiff might recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. F. Hoar, (*C. Devens, Jr.*, with him,) for the defendant.

D. Foster, for the plaintiff.

MERRICK, J. After all the evidence on the part of the plaintiff had been introduced upon the trial, the defendant con-

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tended, and requested the court to rule, that there was none having any tendency to show any consideration for the note declared on, other than what resulted from the note itself. This was refused. And certainly, under the circumstances in which the request was made, it could not with any reason have been complied with; for as is distinctly shown in the bill of exceptions, James Coombs, who was produced as a witness by the plaintiff, had testified that the bargain was that he and Small were to have for the New York lands conveyed by them the note declared on, and the real estate in Worcester, of which a deed was made to them by Larkin Smith. According to this testimony, the conveyance of the New York lands constituted the consideration of the note.

Upon his cross-examination by the defendant, he was inquired of by the plaintiff, "what arrangement, if any, was made about incumbrances" upon the estate in Worcester. This was objected to by the defendant, on the ground that the plaintiff could not contradict the deed by oral testimony. But the court allowed the question to be put. The principle stated in the objection is undoubtedly correct; but it has no application to the interrogatory proposed to the witness. The object of the inquiry was not in any degree to bring out an answer which would tend to vary or contradict anything contained in the deed, but only to show in what manner the parties had, after its execution, agreed between themselves to adjust and settle their respective rights under the grantor's covenants of warranty and against incumbrances. For this purpose the evidence sought for was clearly admissible.

The ruling of the court, that if the note was given and accepted in satisfaction or partial satisfaction of the claim for damages on the covenant against incumbrance, in Smith's deed to the plaintiff, he was entitled to recover its contents in this action, was certainly unobjectionable, if it appears that the deeds of the New York lands did in fact convey to the grantees a good and sufficient title thereto. And that they had this effect, though it was otherwise held by the presiding judge upon the trial, appears to us to be very plain. The objection

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is, that a deed purporting to convey a certain and specific number of acres in a tract of land of which the grantors were owners only as tenant in common with others, is inoperative and void. It appears from the bill of exceptions that Coombs and Small each owned an undivided fourth part of land containing more than 14,000 acres in common with several other persons, and that no share in the same had ever been set off in severalty. The deed describes the land as "undivided, and known and distinguished as the southerly half part of township numbered eight, called Hollywood, in the county of St. Lawrence and State of New York." As the half township contained at least 14,000 acres, and as they owned one half of it in common, a conveyance of 1750 acres was a much smaller proportion of the tract than they had a perfectly good right to convey. Instead of expressing in the deed in express words or terms the part or proportion of their interest which they intended to convey, this was done indirectly, but just as intelligibly and effectually, by a conveyance of a specified number of acres. They conveyed 1750 acres undivided; so that, if the whole tract consisted of 14,000 acres, the conveyance was of $\frac{1750}{14000}$ parts of it. *Gibbs* v. *Swift*, 12 Cush. 393. *Jewett* v. *Foster*, 14 Gray, 495. *Battel* v. *Smith*, 14 Gray, 497.

Exceptions overruled.

JAMES W. JENKINS *vs.* AVIRA WILLIAMS.

A promissory note, given in consideration of the payee's verbal promise to convey to the maker an interest in land, and to release certain claims against the maker and a third person, is not wholly void; and the payee may enforce a mortgage of personal property given to secure payment of the note, if it does not appear that the property exceeds in value the latter part of the consideration.

REPLEVIN of a yoke of oxen. Trial and verdict for the plaintiff in the superior court before *Allen*, C. J., to whose rulings the defendant alleged exceptions, the substance of which is stated in the opinion.

W. A. Williams, for the defendant.

C. Devens, Jr., (*G. F. Hoar* with him,) for the plaintiff.

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MERRICK, J. The defendant contends that this action cannot be maintained, for the reason that the note secured by the mortgage under which the plaintiff claims to have derived title to the oxen replevied was made without any legal or valid consideration. The evidence produced upon the trial shows that the plaintiff held a note against Lafayette Williams, a brother of the plaintiff, on which there remained due the sum of $1894.87; that the payment of it was secured by a mortgage upon the real estate of the said Lafayette, and by the guaranty of Almond Williams, another brother, and in part also by notes given by the defendant for $800 to be held as collateral security; that all these parties then met, and it was agreed by and between the plaintiff and the defendant that the latter should assume the debt of Lafayette, and give his own note for the amount due to the plaintiff, who orally promised as a consideration therefor that he would release the defendant from the notes held as collateral security, would wholly discharge Almond from his guaranty, and would, on payment of the note then to be given by the defendant, transfer and assign to him all the plaintiff's interest in the real estate conveyed to him in mortgage by Lafayette Williams. Upon this consideration the note first mentioned was made and given by the defendant to the plaintiff, and at the same time the oxen replevied were conveyed to him in mortgage as security.

The defendant now insists, that as the contract was entire and the promise of the plaintiff was in fact to convey an interest in real estate, and was not made in writing, it cannot by means of the statute of frauds be enforced; and therefore that the consideration of the note is illegal and void. Rev. Sts. c. 74, § 1. But it is very obvious that the whole consideration is not obnoxious to that objection. It does not apply at all to the promise to surrender to the defendant his own notes for $800, or to the release and discharge of Almond from the obligations arising under his guaranty. These are separable from the promise to assign and transfer the interest in real estate held by the plaintiff under the mortgage of Lafayette; and to that extent the consideration is perfectly good. *Irvine* v. *Stone*,

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6 Cush. 508. This would entitle the plaintiff to at least a partial recovery upon the note; and as there was no evidence produced upon the trial tending to show that the value of the oxen mortgaged by the plaintiff would exceed or even be equal to the part of the note which is undoubtedly recoverable, the defence interposed by the defendant cannot be availed of by him. If he intended to deny that the unobjectionable part of the consideration would entitle the plaintiff to recover upon the note a sum equal to the value of the oxen mortgaged, that should have been made a subject of distinct investigation and inquiry. But instead of this, the court was requested to instruct the jury that, if the contract was entire on the part of the plaintiff, he could recover nothing on the note. This, in view of the actual consideration upon which it was made, and which was fully shown by the evidence produced, and in reference to which the instruction was asked and is now to be considered, was too broad and general to be sustained, and therefore the court properly declined to adopt it. We are to presume that, if it had been desired, suitable directions in matter of law would have been given to the jury in relation to the separate parts of the consideration, by which they would have been enabled to determine what was due according to the proportion of the consideration which was valid and unobjectionable. As no request appears to have been made upon this subject, an omission to state the rule of law in relation to it affords no ground of exception.

There was evidence submitted to the jury tending to show that the papers and memoranda produced upon the trial, and concerning which the plaintiff testified, were exhibited to the defendant when the computation to ascertain the amount due in the note of Lafayette was made, and that they contained a statement of the several items upon which the amount of indebtedness for which his own note was given was ascertained. It was right therefore to allow them to be submitted to the jury.

Exceptions overruled.

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John Marcy *vs.* Moses Barnes & others.

In an action on a promissory note purporting to be made by two persons, one of whom contests his liability on the ground that his name was fraudulently placed upon the note after it came into the possession of the plaintiff, the plaintiff may introduce evidence that before discounting the note, and in the absence of the defendants, he inquired of another person concerning the pecuniary responsibility of both the alleged makers, and was informed that the one whose signature is in controversy was good and the other unfit to be trusted; but not that at the same conversation the plaintiff said that he was to have the name of this defendant upon the note.

Upon the issue of the genuineness of a signature, magnified photographic copies of this signature, and of admitted genuine signatures of the same person, are admissible in evidence, accompanied by competent preliminary proof that the copies are accurate in all respects except as to size and coloring.

A photographer, who is accustomed to examine handwriting in connection with his business, with a view to detect forgeries, is qualified to give an opinion, as an expert, as to the genuineness of a disputed signature; even if his opinion is based in part on enlarged photographic copies made by himself of the disputed signature and of admitted genuine signatures of the same person, which he testifies are accurate copies except as to size and color.

Action of contract. Trial and verdict for the plaintiff in this court before *Hoar*, J. The defendants alleged exceptions, the substance of which is stated in the opinion.

P. C. Bacon, for the defendants.

C. Devens, Jr. & G. F. Hoar, for the plaintiff.

Merrick, J.* This is an action to recover the contents of the promissory note declared on, purporting to be signed by all the defendants. Zephaniah Baker & Co. were defaulted, and Moses Barnes alone interposed any defence. In his answer, he denied the genuineness of the signature of his name which appears upon it, and alleged that it had been fraudulently placed there. This constituted the issue to be determined; and it was conceded at the argument by the counsel of both partes that the precise question which arose and was contested upon the trial was whether the name of Moses Barnes was affixed to the note before or after it came into the possession of the plaintiff.

In addition to other evidence produced by the plaintiff,

* Chapman, J. did not sit in this case.

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Lucian Marcy was called as a witness in his behalf, and testified that he was present on a certain occasion, and heard the plaintiff, in reference to a loan about to be made by him to Z. Baker & Co., make inquiries of his father respecting their credit; that his father replied that he would not trust them a dollar; that he then said he was to have the name of Moses Barnes; and that his father said Moses Barnes was good. This conversation was not in the presence or knowledge of either of the defendants; and the whole of this testimony was objected to by the defendant Barnes. But of the admissibility of a part of it we can entertain no doubt. It was competent for the plaintiff to show that, before parting with his money, he exercised the reasonable precaution of making himself acquainted with the pecuniary responsibility of the parties to whom it was to be lent; and proof that he obtained information from a person, upon whose knowledge and judgment he believed he could confidently rely, that Baker & Co. were worthless and unfit to be trusted, but that Moses Barnes was a man of undoubted credit and ability, would have a tendency to create a high degree of probability that the loan would not have been made without the security afforded by his becoming a party to the note, and thus to show that his name must have been upon it when it was taken. This would be in conformity to the common experience, that men of ordinary prudence consult their own interest and use reasonable care in securing and preserving their own property, and therefore was a circumstance which, though by no means conclusive, yet had an important bearing upon the question at issue. 1 Stark. Ev. (1st Amer. ed.) 487. And upon such a question evidence of inquiries made by the party in interest, and of the information obtained in reply, is not obnoxious to the objection that it is mere hearsay, but is primary and original. The whole, taken together, is a fact, which, like any other fact, may be shown and established by any competent means of proof. 1 Greenl. Ev. § 101.

But the testimony of Lucian Marcy went further than this. He was allowed to testify to the plaintiff's own statement and declaration, that he was to have the name of Moses Barnes

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upon the note which he was about to take. This statement was in relation to a very material question, indeed to the very point in issue to be determined. As this evidence, by the overruling of the objection made to its admission, was permitted to be laid before the jury as competent and proper for their consideration, it could not, if the testimony was believed, fail to have a very prejudicial effect against the defendant, and seriously to weaken and impair the defence upon which he was insisting. The admission of such proof was in violation of the well-known and reasonable rule, that a party cannot by outside and collateral statements in his own behalf make evidence for himself. He was properly allowed to testify upon the trial; but he could not lawfully be permitted to add to that the weight and force of any declaration or statements made elsewhere, when he was not on oath nor subject to the scrutiny of a cross-examination. For this reason, the exception of the defendant to this part of the testimony of Lucian Marcy appears to have been well taken, and it must be sustained.

The magnified photographic copies of the genuine signatures of the defendant, and of the disputed signature, which was submitted to the inspection of the jury, were, we think, in connection with the testimony of Mr. Southworth, admissible in evidence. Assuming it to be true, as he testified, which yet was a fact first to be considered and determined by the jury, that the copies were accurate in all respects, excepting only in relation to size and color, they were capable of affording some aid in comparing and examining the different specimens of handwriting which were exhibited on the trial. It is not dissimilar to the examination with a magnifying-glass. Proportions are so enlarged thereby to the vision, that faint lines and marks, as well as the genuine characteristics of handwriting which perhaps could not otherwise be clearly discerned and appreciated, are thus disclosed to observation, and afford additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation. Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of

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the photographer, we are unable to perceive any valid objection to the use of such prepared representations of original and genuine signatures as evidence competent to be considered and weighed by the jury.

The ruling under which Mr. Southworth was permitted to testify as to his opinion respecting the genuineness of the signatures submitted to his inspection does not appear to have been in any particular incorrect. He had testified that he was accustomed to examine handwriting in connection with his business as a photographer, with a view to detect counterfeits and forgeries, and that his opinion concerning the disputed signature was founded partly upon the photographic copies, introduced in evidence, which he himself had made. It is a general rule, that the court is to determine in the first instance, upon the evidence produced, whether the witness offered is qualified by his peculiar skill, knowledge and experience in any particular art or employment, to testify as to his opinion as an expert; and unless the evidence upon which the determination to allow the witness to testify in that manner is reported, the decision is not open to revision in another court. *Quinsigamond Bank* v. *Hobbs*, 11 Gray, 250. But upon the proof offered upon that subject, as reported in the bill of exceptions, it appears to us that the decision was correct. It is of no consequence how or by what means such peculiar skill or knowledge is acquired; it is quite sufficient if it is in fact possessed.

The evidence as to the manner in which the plaintiff procured the money which he lent to Baker & Co. seems to have been immaterial. We do not think it necessary to express any further opinion in relation to it, as it may not be offered, or, if offered, yet under different circumstances on another trial.

Exceptions sustained.

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Washington County Mutual Insurance Company *vs.* Samuel Chamberlain.

In an action by a foreign mutual insurance company to recover assessments upon a deposit note, if the answer denies that the plaintiffs' agent deposited with the treasurer of the Commonwealth a copy of their charter, as required by the Rev. Sts. *c.* 37, § 41, before the execution of the policy which was the consideration of the note, the burden is upon the company to prove a compliance with the statute, and is not sustained by a certificate of the treasurer that such a copy was deposited with him in a certain year, without showing that it was before the day of the date of the note.

Action of contract by a mutual fire insurance company, incorporated in the State of New York, to recover assessments upon a deposit note. Trial in the superior court before *Wilkinson*, J. who directed a verdict for the defendant. The plaintiffs' alleged exceptions, so much of which as is material to the point decided is stated in the opinion.

E. Mellen & E. B. Stoddard, for the plaintiffs.

C. Devens, Jr. & G. F. Hoar, for the defendant.

Metcalf, J. The defendant denies, in his answer, that Gillet, the plaintiffs' agent, deposited with the state treasurer, as required by the Rev. Sts. *c.* 37, § 41, a copy of their charter, before the execution of the policy which was the consideration of the note on which they now sue for assessments. It was therefore a prerequisite to their recovery, that they should prove the fact which the answer denies. The plaintiffs made the policy under their new charter, which they have not shown to have been previously deposited in the treasurer's office. The treasurer certifies only that it was filed there in the year 1850. But the court cannot legally infer, from this certificate, that it was filed before March 21st 1850, which is the day of the date of the note. The burden is on the plaintiffs to prove a compliance with the requisitions of the statutes. This burden they have not sustained. *Exceptions overruled.*

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Inhabitants of the County of Worcester vs. Barthold Schlesinger & others.

The inhabitants of a county cannot maintain an action of contract against a creditor, who has had his debtor arrested on mesne process and kept in close confinement in the county jail, for board furnished to the debtor by the jailer upon his claiming support as a pauper, if the creditor, after a demand upon him by the jailer to pay for such board, has not requested the county or the jailer to detain the debtor in prison, or to furnish him with board, nor promised to pay for the debtor's support.

Merrick, J. This is an action of contract for the recovery of charges for the board of Henry D. Stone as set forth in the declaration. On the 28th of April 1858 he was arrested on mesne process in favor of other parties, and for want of bail was committed to the jail of the county of Worcester. While he was there held in custody, he was again arrested and committed on a writ sued out against him by the defendants, and eight other writs were at the same time in like manner served upon him. He was again in the month of August following committed on two processes for contempt issued by the court of insolvency. He claimed support as a pauper on all these processes, under and by force of which he continued to be confined in close prison until the 10th of February 1860, when upon discovery of material defects in all of them he was liberated and discharged by judgment of court on writs of *habeas corpus*. *Stone* v. *Carter*, 13 Gray, 575.

But assuming that Stone was held in custody upon a valid writ in favor of the defendants, we are of opinion that this action cannot be maintained. It is therefore unnecessary to consider how far their liability might otherwise have been affected by the several commitments on writs in favor of other parties and upon the processes for contempt.

It is agreed that the defendants, neither before nor after a demand had been made upon them by the jailer for payment of the board of the debtor, requested the plaintiffs or the jailer to detain him in prison, or to furnish him with board, or promised to pay for it, unless such request is implied by law from his

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commitment, the support afforded him, and the demand of payment for his maintenance. This must depend upon the provisions of the statute by which the duties and liabilities of parties are in such cases prescribed and regulated.

No right of action is in terms conferred by any statute, either upon the jailer, or upon the inhabitants of the county within which the jail is situate, to recover of the plaintiffs in the suit upon which he is committed thereto on mesne process or execution. But by *St.* 1857, *c.* 141, § 25, it is provided that when any person confined in close prison on mesne process or execution shall claim support as a pauper, the jailer shall furnish his support, to be paid for by the creditor; and the creditor shall in such case, if required by the jailer, either advance from time to time the money necessary for the support of the prisoner or give the jailer security therefor; and if the creditor shall neglect so to do for twenty-four hours after demand, "the jailer may discharge the prisoner." By *St.* 1859, *c.* 249, § 4, all necessary supplies for the maintenance and support of persons confined in the several jails and houses of correction are to be procured and furnished at the expense of the counties in which they are respectively situate by the county commissioners.

From the provisions of these statutes, it appears that it is only when the debtor is confined in close prison and claims support as a pauper, that the creditor is to be called upon to do anything in relation to his board or support. Each of these contingencies depends upon the will and ability of the debtor, because he may secure to himself the benefit of the prison limits, or he may himself pay for the support afforded to him. Whether they have in fact occurred may be wholly unknown to the creditor. No means are provided for giving him notice of their occurrence, other than the implication resulting from a requirement upon him by the jailer to advance money or give security for the support of the debtor. When a requirement is thus made, he is left free to determine whether he will comply with it, and thereby secure the continued detention and imprisonment of the debtor, or submit to the legal consequences of his omission and neglect. In the latter case, "the jailer may discharge

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the prisoner." It is manifest from the whole scope and purpose of the act, that it was intended by the use of this expression to declare that in such contingency he should do so — that it should be his duty immediately to release the prisoner from custody. The right of arresting and detaining the person of the debtor in prison is given to the creditor for his benefit, and as a legal means by which satisfaction of the judgment, which has been or may be recovered for the debt, may be enforced; but it is given upon prescribed conditions, and is to be exercised only so far as they are complied with. And therefore it is clearly the purpose and design of the act, that when the creditor fails upon demand to furnish means or give security for the support of his debtor, he should be at once released from confinement and set at liberty. Certainly it cannot be supposed that there was any intent to make the question of personal liberty dependent upon the discretion or election of the jailer; but, on the other hand, it may fairly be presumed to have been the will of the legislature in framing an act for the relief of debtors, and especially when, as in the statute above cited, § 1, the declared object of it is the abolition of imprisonment for debt, that an officer having a right to discharge a prisoner should not be allowed to detain him in confinement, but should forthwith release him from custody. It is no forced construction to interpret the word "may" in the statute as meaning "shall" — as importing a duty to be observed, and not a permission to exercise restraint at his pleasure. This signification often is, and ought always to be, assigned to that word when the obvious purpose and real intention of the law requires it. 1 Kent Com. (6th ed.) 467, note, and cases cited. It was certainly so understood on this same subject by the commissioners by whom the Revised Statutes were compiled; and undoubtedly also by the legislature when, in view of their annotation, this particular section was re-enacted. Report of Commissioners on Rev. Sts. *c.* 97, § 51, note. Rev. Sts. *c.* 90, §§ 113, 114; *c.* 97, §§ 48–50. *St.* 1821, *c.* 22.

It has been urged for the plaintiffs, that this action can be maintained to recover at least for the board of the prisoner dur-

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ing the twenty four hours next succeeding the demand upon the defendants, because until the expiration of that time it was the duty of the jailer to detain and support him. But we think not. No such action is given, and indeed no provision is made in view of the occurrence of such a contingency. Probably in framing the statute it did not occur to the makers of the law that there was occasion for any. The inconsiderable expense which may occasionally be incurred in this way by a public officer in the performance of his duty must rather be regarded as incident to the administration of justice, and to be borne by the government under whose authority he acts.

Judgment for the defendants.

D. Foster, for the plaintiffs.

T. L. Nelson, for the defendants.

LYMAN UNDERWOOD & another *vs.* WILLIAM T. CLEMENTS, Administrator.

A recognizance, taken by the justice of a police court from a debtor arrested on execution and carried before him pursuant to *St.* 1857, *c.* 141, the condition of which requires the debtor to surrender himself for examination in court, instead of before the justice, is void.

ACTION OF CONTRACT on a recognizance taken by a justice of the police court of the city of Worcester from a debtor arrested on execution and carried before him pursuant to the provisions of *St.* 1857, *c.* 141, by the condition of which the debtor was required to surrender himself "for examination before said police court within ninety days, for the purpose of taking the oath for the relief of poor debtors." Demurrer, because the justice had no authority to require the debtor to surrender himself in court. The superior court sustained the demurrer, and the plaintiff appealed.

C. Devens, Jr., for the defendant.

W. A. Williams, for the plaintiff.

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CHAPMAN, J. By the statute referred to in the condition of the recognizance, a debtor may be arrested at any time, and when arrested he shall be carried before some one of the magistrates named in the fourth section, at any place where the magistrate can be conveniently found, and without any further delay than to give him a reasonable opportunity to obtain sureties. The examination is not to be a proceeding in court; for in many cases the magistrate has no authority to hold courts except in places and at times established by law, with long vacations between the terms. But the examination is to be made without waiting for the session of the court, and in any convenient place which the magistrate may select. If the debtor gives a recognizance under the tenth section that he will deliver himself up for examination within ninety days, it should be to deliver himself up to the magistrate, without being restricted to appear in court. In this recognizance the magistrate, having required that the debtor should surrender himself before the police court, has exceeded his jurisdiction, and the recognizance is void.

Judgment for the defendants.

JOHN RHODES & another *vs.* CHARLES E. BROOKS & another.

Under *St.* 1857, *c.* 141, a return of *non est inventus* upon an execution will not support a writ of *scire facias* against the sureties in a bail bond, given by the defendant upon his arrest on mesne process in the same action, unless the certificate required by § 3 was annexed to the execution.

SCIRE FACIAS against the sureties in a bail bond given by Isaac W. Hopkins, arrested on mesne process at the suit of the plaintiffs. Hopkins, without being surrendered by his bail, appeared before a master in chancery and took the oath for the relief of poor debtors, and on the same day the plaintiffs recovered judgment against him, on which execution issued and was delivered to a deputy sheriff for service, who made return thereon that, after diligent search, he was unable to find within his precinct the body of Hopkins or any property on which to satisfy the

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execution. Upon these facts the case was submitted to the judgment of the court.

T. L. Nelson, for the plaintiffs.

H. Chapin, for the defendants.

CHAPMAN, J. The *St.* of 1857, *c.* 141, makes no provision for the discharge of a debtor who has given a bail bond upon his taking the oath, unless he has been surrendered by his bail or arrested on execution; but in order to lay the foundation of a *scire facias* against his bail, there must be a return of *non est inventus* made by an officer who has authority to arrest him on the execution. But no officer has such authority unless there is annexed to the execution the certificate prescribed by § 3. In this case there was no such certificate, and therefore the return is invalid. *Judgment for the defendants.*

INHABITANTS OF NORTH BROOKFIELD *vs.* INHABITANTS OF WARREN.

Upon the issue of the settlement of a pauper, depending upon the question whether his father was born before or after the marriage of his parents, the date of which is not disputed and was more than fifty years ago; and after a witness has testified to having seen the pauper's father during the life of a person who died in the year preceding that of the marriage, and who was a stranger in blood to the pauper's family; a parchment kept framed and hanging in a conspicuous place in the house occupied by the family of the deceased, containing a record of the dates of births, marriages and deaths of various members of the family, for a long series of years, including the date of the death in question, and handed down by the father to a brother of the deceased as containing a true statement of the events recorded on it, is admissible in evidence; as is also proof of the inscription on a gravestone in the family burial-ground, bearing the name and the date of the death of the deceased.

ACTION OF CONTRACT for the support of William M. Chickering, a pauper.

At the trial in the superior court before *Lord*, J. the plaintiffs introduced evidence tending to show that Harvey Chickering, the pauper's father, was the legitimate son of Nathaniel Chickering and Ruth Richardson, (who, as was agreed, were married in Connecticut on the 22d of February 1804,) and

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that Nathaniel gained a settlement in the defendant town under the *St.* of 1793.

The defendants, to prove that Harvey was born before the marriage of his parents, and was therefore illegitimate, called a witness who testified that, in the fall of 1803, in company with her aunt, Mrs. Blair, she made a visit to a relation who lived near the house in which Ruth Richardson was then living, and while there saw Harvey Chickering, then an infant two or three weeks old; that she remembered the date from the fact that Mrs. Blair's only daughter, named Susanna, was with them and was about a year old, and that this daughter was born in September 1802, and died on the 12th of December 1803; and that she had been kept in remembrance of the date of Susanna's death by constant intercourse with her family since and by frequent reference to the family record. The Blair family was not related to the Richardson or the Chickering family.

The defendants then offered, as evidence that Susanna died on the 12th of December 1803, a large ornamented sheet of parchment, bearing the inscription "family record," on which were entered the dates of the birth and marriage of Susanna Blair's parents, the dates of the birth and death of Susanna, and of the births, marriages and death of two sons born subsequently of the same parents. One of these sons, forty seven years old, testified that, ever since his earliest recollection, his father had kept this parchment framed and hanging in a conspicuous place in his dwelling-house, and had handed it down to him; that during all this time the same entries had been on it; and that his father and mother were dead. And there was evidence that the entries of the births and deaths upon the parchment were made, all at one time, by direction of Susanna's father, more than forty years before the trial; that the record of the marriages of his children had been added, from time to time, as they occurred; and that he and his son kept and exhibited the parchment as a true statement of the events recorded on it.

The defendants also offered to prove that an ancient gravestone in the burial-ground of the Blair family bore the name

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Susanna, and had inscribed on it December 12th 1803 as the date of her death.

The evidence offered by the defendants was excluded; the jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

G. F. Hoar, for the defendants.

P. C. Bacon & P. E. Aldrich, for the plaintiffs, cited 1 Greenl. Ev. § 52; 1 Phil. Ev. *c.* 8, § 4; *Vowles* v. *Young*, 13 Ves. 140; *Mima Queen* v. *Hepburn*, 7 Cranch, 296; *Ashley* v. *Wolcott*, 11 Cush. 192.

Bigelow, C. J. At the trial of this case, the date of the birth of the father of the pauper, Harvey Chickering, became a material fact, because the legal settlement in controversy depended on the question whether the father was born prior to the marriage of his parents, which took place on the 22d of February 1804. To prove the illegitimacy of Harvey Chickering, the defendants introduced a witness who testified that she saw him, then an infant, during the lifetime of Susanna E. Blair. It then became important to establish the date of Susanna's death, because if she died before the date of the marriage of the parents of Harvey Chickering, it would follow that he must have been born out of wedlock.

It was a case therefore where the proof of a fact material to the issue depended on the existence of another collateral fact. The *factum probandum* might well be inferred from satisfactory evidence that an event, otherwise immaterial, took place at a particular time. Such testimony is not only competent, but without it it would often be impossible to prove essential facts in a court of justice. Direct and positive proof cannot always be obtained, and in matters especially which relate to remote periods it is necessary to resort to circumstantial evidence and presumption to supply the place of that testimony which is lost by the lapse of time and the imperfection of human memory. Such evidence in the strict legal sense is not collateral. It raises, it is true, a new and distinct inquiry; but if it affords a reasonable presumption or inference as to the principal fact or matter in issue, it is relevant and material and

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does not tend to distract or mislead the jury from the real point in controversy.

The objection more strenuously urged to the evidence offered at the trial is to the nature and quality of the proof by which the defendants sought to establish the date of Susanna Blair's death. It is not denied that this evidence would have been competent, if it had been introduced to prove a fact directly in issue, such, for instance, as the date of the pauper's birth; but it is contended that it was inadmissible to establish a fact collateral in its nature, from which the main fact in issue was to be deduced by inference. But we know of no such distinction in the rules of evidence. The competency of proof cannot be made to depend on the inference or conclusion which is sought to be drawn from it. If it is competent to prove a particular fact in controversy when it is directly in issue, it is equally competent when the same fact is to be established in order to form the ground of an inference or presumption from which the material subject of inquiry can be deduced. The true test is, to inquire whether the evidence is admissible to prove the fact which it is offered to establish, and not whether such fact is directly or only collaterally in issue.

In the present case, the defendants sought to prove the date of the death of Susanna Blair by a document or chart containing a record of the births, marriages, and deaths kept in her family for a long series of years, and handed down by her deceased parent to his sons as containing a true statement of the events therein recorded; and also by proof of the inscription on the tombstone erected to her memory in the family burial-ground. Such evidence is deemed to be competent and satisfactory proof of family descent, and also of the dates of the leading events in family history, such as births, marriages and deaths, especially when they relate to ancient occurrences. They are contemporaneous with the events which they record; they are made by parties who are cognizant of the facts, and who would have no interest or motive in misstating them; and they are in their nature public, openly exhibited, and well known to the family, and therefore may be presumed to possess that authen-

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ticity which is derived from the tacit and common assent of those interested in the facts which they record.

Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened, are directly put in issue. But upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation.

We are therefore of opinion that the rejection of the proof offered at the trial to establish the date of the death of a person who deceased more than fifty years previously was erroneous. 1 Greenl. Ev. §§ 103, 104. *Berkeley Peerage Case*, 4 Campb. 401. *Monkton* v. *Attorney General*, 2 Russ. & Myl. 162. *Jackson* v. *Cooley*, 8 Johns. 131.

Exceptions sustained.

Montraville Flagg *vs.* Nahum Flagg.

A private way, duly established under *St.* 1786, *c.* 67, § 1, for the use of one or more individuals of a town or proprietors therein, is not discontinued by the unity in one person of title to and possession of all the land through which it is located.

In the location of a private way laid out by the selectmen and accepted by the town, a description of it as "a bridle road" does not confine the right of way to a particular class of animals or special mode of use.

A quitclaim deed, securing to the grantor a right to use a way over the land granted for a certain purpose, and with a covenant of warranty against all persons claiming by or under the grantor, does not estop him to use the way for other purposes, if it had previously been legally laid out by the selectmen and accepted by the town as a private way.

Action of tort for trespass on real estate. The case was submitted to the judgment of the court upon the following agreed statement of facts:

"The alleged trespass consisted in the driving of the defendant's cows to and from a pasture owned by him within the limits of a way in the town of Boylston, which was located in

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November 1808 by the selectmen of that town, by a written location, describing the same by metes and bounds, in which the same is called 'Stephen Flagg, Jr. and Eliakim Hastings road, a bridle road rods wide.' 'At the town meeting held in March 1809, under an article in the warrant for that purpose, this way was accepted in the following terms: 'Art. 11th acted upon so far as to accept of the laying out of a private way through land of Stephen Flagg, Jr. and Eliakim Hastings. See Minutes of Town Roads, p. 20,' which page contains the said location by metes and bounds.

"At the date of the location the land through which the way was laid out was owned, one part by Eliakim Hastings and another part by Stephen Flagg, Jr.; and the way ran from the county road to that part of the land of said Flagg which is now owned by the defendant, and is the pasture to and from which he drove his cows, but did not connect at that end with any public road.

"After the death of said Flagg, one of his sons, Abijah Flagg, who was the father of both the plaintiff and the defendant, became, by different purchases and conveyances, made at different times, the owner of all the land through which the way was located. The last of these conveyances to him was made April 1st 1819. After this time he occupied the entire estate as his home farm until the year 1838, when he conveyed two undivided thirds thereof to the plaintiff and the defendant as tenants in common. Abijah died seised of the remaining undivided third in 1850, and by his will devised it to the plaintiff and defendant in common. On the 26th of October 1852 they made mutual conveyances of the whole estate by quitclaim deeds; each with a covenant of warranty against lawful claims and demands of all persons claiming by or under the grantor; and that from the defendant to the plaintiff reserving the 'privilege of using the cart path to cart wood, hay and manure to and from my house to land this day conveyed to me by said Montraville during the time the said Nahum shall personally occupy the premises hereby conveyed.' The cart path thus mentioned is that portion of the located way in which the

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alleged trespass was committed. A part of the way as originally located is included within the limits assigned to the plaintiff, and a part within the limits assigned to the defendant, and both the plaintiff and defendant use the lower part of the way as their only access from their dwellings to the county road.

"It is not claimed that the defendant is entitled to a way of necessity to and from the pasture, but he justifies the alleged trespass by reason of the aforesaid location. The plaintiff contends that the location, and all rights derived under the same, were extinguished by the unity of title and possession in Abijah Flagg."

G. F. Hoar, (*C. Devens, Jr.* with him,) for the plaintiff. 1. If any way ever existed, it has ceased. If it was a right personal to those for whose use it was laid out, the defendant cannot justify. If it was appurtenant to their lands, it has been extinguished by unity of seisin and title. Whether the right became merged in the general ownership depends, not upon the mode of creation, but upon the nature of the thing created.

The right of way was created by public authority; its enjoyment is perhaps to some degree protected by public remedies; and the public may, if they see fit, contribute toward its purchase, and may discontinue it when the reason for its creation ceases. *St.* 1786, *c.* 67, §§ 1, 2, 7. But when created and enjoyed, it is essentially nothing more than a right of way for the use of an individual, who may use it or refrain from using it at his pleasure, and may grant it as appurtenant to the lands to which it is annexed. No other person has any rights in it. Sullivan on Land Titles, 287–290. The town is not only not obliged, but not authorized, to keep it in repair. *St.* 1786, *c.* 81, § 1. Rev. Sts. *c.* 25, §§ 1, 8. The authority given to any individual to remove obstructions is not extended to it; and no liability is created by statute for defects in it. Rev. Sts. *c.* 25, §§ 21, 22. The statutes treat it as private property, authorizing the owners in some cases to organize as a corporation. Rev. Sts. *c.* 25, § 34. Railroad corporations cannot alter its course, as they may that of public ways which they are bound to leave open; but the individual proprietors of the easement are entitled

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to damages, when it is obstructed by a railroad. Rev. Sts. c. 39, §§ 70, 71. The commissioners on the Rev. Sts. c. 24, § 61, *note*, imply their opinion that it is a private easement only.

In New York, under a similar system, an action on the case has been held to lie in behalf of the person authorized to use the way, for its unauthorized use by another, because the plaintiff is solely charged with the expense of repairing. *Lambert* v. *Hoke*, 14 Johns. 383. The cases as to "private highways" in New Hampshire and "pent roads" in Vermont, cited for the defendants, arose under wholly different statutes.

2. The way located was merely a "bridle-road," which gave no right to a drift-way for cattle. The term "bridle-way" had a well defined meaning at common law, being equivalent to horse-way, and does not include drift-ways. *Allen* v. *Ormond*, 8 East, 4 & note. *The King* v. *Salop*, 13 East, 95. *Logan* v. *Burton*, 5 B. & C. 513. *Ballard* v. *Dyson*, 1 Taunt. 279. *Regina* v. *Sainthill*, 2 Ld. Raym. 1174; *S. C.* 6 Mod. 255. *The King* v. *Spiller*, Style, 108. *Madox's case*, Cro. Eliz. 63. 2 Hawk. c. 76, § 1. 2 Selw. N. P. 1315. *St.* 13 G. 3, c. 78, § 19. Gale & Whatley on Easements, 201. 2 Bl. Com. (Chit. ed.) 38, note 28. Barclay on Highways, 370. A man might well consent to the laying out of a bridle-way by his dwelling, or to receive small damages therefor, when he would not consent to the driving of horned cattle over his land.

3. The deed from the defendant to the plaintiff, covenanting to warrant against all persons claiming under the grantor, and defining and restricting the use which he is to make of the cart path, estops him to assert that he is a person for whose use the way in question was laid out.

D. Foster & G. W. Baldwin, for the defendant, cited *Sts.* 1785, c. 75, § 7; 1786, c. 67, §§ 1, 2, 3, 7; c. 81, §§ 5, 7; Anc. Chart. 269, 459, 504; *Cragie* v. *Mellen*, 6 Mass. 7; *Commonwealth* v. *Gowen*, 7 Mass. 378; *Avery* v. *Stewart*, 1 Cush. 496; *Metcalf* v. *Bingham*, 3 N. H. 459; *Clark* v. *Boston, Concord & Montreal Railroad*, 4 Foster, 118; *Whitingham* v. *Bowen*, 22 Verm. 317, and cases cited.

Bigelow, C. J. By *St.* 1786, c. 67, § 1, which embodied

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the provincial statutes directing the method of laying out highways and other roads in a town, no distinction is made between those ways which were established for "the use of such town only," and those which were laid out "for the use of one or more individuals thereof or proprietors therein." The term "private or particular way" is there used, not to designate or define the use or purpose for which it was laid out, or the nature or extent of the easement which it created, but in contradistinction to a highway or public road, which was not confined within the boundaries or territory of a town, but extended from town to town or place to place, and which could be laid out only by the court of sessions. Nor was it intended by the phrases "for the use of such town only," or "for the use of one or more individuals thereof or proprietors therein," to limit the easement or rights created by the way to the inhabitants of the town or the owners of land therein, or to particular individuals, but to describe it as a road for local accommodation and convenience, which the selectmen were empowered to lay out at the expense of the town or the persons who would receive the greatest benefit from the establishment of the way. This view of the construction of the language of the statute was taken in the early case of *Cragie* v. *Mellen*, 6 Mass. 13, in which the court say that it is evident that the intention of the legislature in using these words was only to distinguish the cases within the authority of towns by their selectmen from those committed to the court of sessions. The statute was evidently framed with a design to give jurisdiction and define its extent in the matter of laying out private ways for the use of towns and individuals, but was not intended to declare or limit the use or easement which would be created in them by its exercise. It follows that the argument, in support of the position that a private way laid out by a town for the use or benefit of individuals creates only a right personal to those for whose convenience and accommodation it was originally established or appurtenant to their estates, is not sustained by a just interpretation of the words of the statute. Nor can we see any good reason for holding that such is the legal effect of the

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establishment of such ways. On the contrary, there are decisive considerations which lead to an opposite conclusion. In the first place, as has been already stated, private ways are put by the statute on the same footing as town ways; but no one would contend, because the latter are laid out for the use of the town only, that after they are established, the right to their use and enjoyment is personal to the inhabitants of the town. In the next place, it is inconsistent with the whole scope of the provisions of the statutes relating to such ways, to construe them as applicable only to the creation and protection of private rights and easements. They are laid out by public officers and accepted by a vote of the town; they can be discontinued by public authority, even against the consent of those for whose accommodation they were originally laid out; the damages occasioned by their construction may be paid in whole or in part from the treasury of the town; they cannot be lawfully encumbranced or obstructed by any one by means of fences or buildings erected within their limits, unless they have been suffered to remain there for a period of time sufficiently long to authorize a similar obstruction in a highway, and such unlawful obstructions are treated as nuisances; and finally, it would not be competent for selectmen and towns to locate and lay them out for private use only as personal rights or easements belonging to individuals, because no one can be authorized to create an easement in the land of one against his consent for the benefit of another. It would be a violation of the fundamental principle by which private property is made secure from any sequestration or appropriation except for a public use. It is a mistake therefore to suppose that a private way laid out under *St.* 1786, *c.* 67, § 1, creates a right or easement which is personal in its nature and appurtenant to land, so that it may be extinguished by unity of seisin and title. It is a private way, only as distinguished from a highway or common road, and because in its origin it was laid out for the accommodation and benefit of individuals. But when laid out and established, it becomes a way or easement in its nature public, which any one having occasion may use and enjoy until it is lawfully discontinued.

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Such seems to have been the character of the way which was laid out by the selectmen and the town of Boylston in the year 1809, and concerning which the present controversy has arisen. It is called in the vote of the town a private way; nor is there any limitation prescribed as to the mode of its use and enjoyment.

It was suggested that a restriction was imposed by the use of the term "a bridle road," in the location by the selectmen. But we do not think this phrase has any such definite or well settled meaning in the law, or by common usage in this commonwealth, as to authorize us to infer that it was inserted in the location in the present instance with an intent to confine the right of way to a particular class of animals or other special mode of use.

It is hardly necessary to add that the defendant is not debarred from the use of the road by the covenant in his deed to the plaintiff. Such a covenant cannot operate by way of estoppel so as to prevent a party from claiming a right to enjoy a public way or easement. *Judgment for the defendant.*

AUSTIN BROOKS & wife *vs.* INHABITANTS OF PETERSHAM.

On the trial of an action against a town for an injury occasioned by insufficient width of and other defects in a highway, the plaintiff may introduce evidence of its width nine months after the injury, in connection with evidence that the width has not been changed meanwhile.

On the trial of an action against a town for an injury, received by the plaintiff while driving over a highway, and occasioned by a defect in the way, the jury were instructed that "if the original cause of the accident was a defect in the highway for which the town was liable, and which frightened the plaintiff's horse, causing him to run, the mere want of prudent management on the part of the plaintiff or another person in the vehicle after the horse began to run, or the mere fact that the plaintiff's companion imprudently seized the reins and turned the horse from the road, would not exonerate the defendants." *Held*, that the defendants had good ground of exception.

ACTION OF TORT for injuries sustained by the female plaintiff in a highway, which the defendants were bound to keep in repair.

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At the trial in the superior court before *Russell*, J., it appeared that on the 18th of July 1858 Mrs. Brooks was driving along the way a horse attached to a vehicle, in which she and another person were sitting; that at the top of a hill the horse began to run, and after he had run some forty rods the wheel of the carriage struck against a rock projecting above the ground near the travelled part of the way between the ditches on each side of it, and Mrs. Brooks was thrown out and injured.

The plaintiffs claimed that the way, where the horse began to run, was so soft and uneven as to be defective, and that this condition of the way frightened the horse and was the cause of his running; and they also relied upon the narrowness of the way, the depth of the gutters near the sides of it, and the projecting rock, on which the wheel struck, as defects; all of which the defendants denied, and much evidence on these points was introduced by both parties.

The plaintiffs called a witness, who testified that he made some measurements of the way in April 1859; and the presiding judge, against the defendants' objection, permitted this witness to state the width of the way between the ditches and the width of the travelled part of the way on the 1st of April 1859. The plaintiffs afterwards offered evidence tending to show that between that time and the time of the injury there had been no change in these dimensions.

The defendants offered evidence tending to show that Mrs. Brooks was able to guide the horse during his running, and would have passed safely down the hill, but that her companion, who was an insane woman, became excited when the horse began to run, seized and obtained control of the reins, and, in spite of her remonstrances, turned the horse out of the travelled part of the way.

The judge, at the defendants' request, instructed the jury as follows: "The law is well settled, that if the negligence of a third person occasioned the injury, the town is not liable. If then the horse started to run away, from a cause for which the defendants were not at fault, and if a person in the vehicle, not possessing competent skill or intelligence to drive, obtained

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the control of the reins and turned the vehicle out of the travelled path on to the rock under the excitement of fear, and such turning caused or contributed to the accident, then the plaintiffs cannot recover."

The judge, against the defendants' objection, further instructed the jury thus: "But if the original cause of the accident was the fact that the horse was frightened and caused to run by a defect in the road, for which the town was liable, and the horse was a proper horse for a prudent person to drive, and properly driven, then the mere want of prudent management on the part of Mrs. Brooks or her companion, after the horse began to run, or the mere fact that she imprudently seized the reins and turned the horse from the road, would not exonerate the defendants. All that is required in such circumstances is such a degree of care and prudence as the situation of the party would naturally or probably admit, and due allowance is to be made for the natural alarm caused by such an accident. If through the fault of the town in having a defective highway, these parties were placed in an exciting and alarming situation, then the law only requires such care as is natural in such a situation."

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

C. Devens, Jr. & G. F. Hoar, for the defendants.

P. C. Bacon & P. E. Aldrich, for the plaintiffs, cited *Lund* v. *Tyngsboro*, 11 Cush. 563; *Palmer* v. *Andover*, 2 Cush. 608; *Ingalls* v. *Bills*, 9 Met. 1; *Stokes* v. *Saltonstall*, 13 Pet. 181; Redfield on Railways, 334 & note.

Bigelow, C. J. The objections urged to the evidence which was offered to show the width of the road at the place of the accident several months after it happened go to its weight and not to its competency. The condition of the road at the time the occurrence took place was undoubtedly the real subject of inquiry. But in those particulars in which it was proved to have remained unchanged, its subsequent condition was direct evidence bearing on its safety and convenience previously. An accurate measurement of the road from side to side, and of the width of the travelled path, is often essential to enable the jury

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to pass intelligently on the issue presented to them in cases similar to the one at bar; and there can be no danger in admitting evidence of such facts, although ascertained subsequently to the time when the alleged defect in the highway is said to have existed, if it is accompanied by proof that no material change has taken place which can affect the accuracy of subsequent observations. *Aldrich* v. *Pelham*, 1 Gray, 510.

The instructions given to the jury seem to have been full and for the most part correct, and well adapted to the facts in proof. But in one respect they were defective, and tended to mislead the jury in weighing the evidence bearing upon one of the essential issues in the case. The plaintiff was bound to use ordinary care as well after as before the horse began to run, in consequence of the defect in the road. She could not abandon herself to needless alarm or give up all proper control of the horse, in consequence of the peril to which she was exposed by the negligence of the defendants in omitting to keep their road in suitable repair. She was still bound to use such care as a person of ordinary prudence and discretion would exercise if placed in similar circumstances and exposed to a like danger, making due allowance for the alarm into which she and her companion were thrown by the occurrence of the accident. If such care had been used, the horse might have been kept under control so as to avoid the defect in the road. The error in the instructions was that the jury were told that "the mere want of prudent management on the part of Mrs. Brooks or her companion after the horse began to run, or the mere fact that she imprudently seized the reins and turned the horse from the road, would not exonerate the defendants." This in effect left the jury to find a verdict for the plaintiff, although she was guilty of a want of ordinary care which contributed to the accident. Imprudence implies a want of due care. Being of opinion that the residue of the instructions was not sufficient to do away with the erroneous impression which the jury might well have derived from this portion of the charge, we feel compelled on this ground to order a new trial.

Exceptions sustained.

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John McClellan *vs.* Erastus Fisher.

An award of referees that the owner of a mill-dam shall pay to the owner of land flowed by his dam one hundred dollars a year as long as the dam is kept at its present height, "and no more, unless by so doing he pays damage, if any is done by increasing the height," is no bar to a complaint under the mill act to recover damages occasioned by raising the height of the dam, prosecuted in the name of a person to whom such owner of the land flowed has since the award and the raising of the dam conveyed it, reserving to himself the right to collect the annual damages awarded, and "the right to take all necessary and proper legal measures to collect, either in his own name or in the name of the owner of the estate hereby conveyed, all such damage as shall be caused to said estate by means of said dam, kept at any height up to the present height of said dam; the owner of the estate having the right to recover to his own use all the damage which shall be occasioned to said estate by so much of the height of said dam as shall be above its present height."

Complaint under the mill act, Rev. Sts. *c.* 116. The parties stated the following case, upon which the superior court gave judgment for the complainant, and the respondent appealed.

The parties are owners of adjoining estates and water privileges, and the respondent maintains a mill-dam which flows the complainant's land.

On the 14th of July 1848 Joshua Leland, the complainant's grantor, and the late firm of Waterman A. Fisher & Co., of which the respondent was a member and from which he derives his title, agreed in writing to submit to the final determination and award of certain referees, mutually chosen, a claim of Leland against Fisher for damages for flowing the land now owned by the complainant.

On the same day the referees awarded that Fisher & Co., their heirs, &c., should pay unto Leland, his heirs, &c., "the sum of one hundred dollars a year, payable annually, the first payment to be paid on the first day of October next, and to continue to pay yearly the same amount as long as the dam is kept at the height it now is, and having the privilege of having flash-boards upon the dam six inches in height, and no more, unless by so doing they pay damage if any is done by increasing the height of said flash-boards."

On the 31st of October 1854 Leland conveyed his land to

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the complainant, "the grantor however reserving unto himself and his legal representatives the right to collect, have and receive the amount due annually from Waterman A. Fisher & Co. by virtue of an award made on the 14th day of July 1848;" "with the further reservation of the right to take all necessary and proper legal measures to collect, either in his own name or in the name of his legal representatives, or in the name of the owner of the estate hereby conveyed, all such damage as shall be caused to said estate by means of a dam below the same estate, kept at any height up to the present height of the dam of said Waterman A. Fisher & Co.; the owner of the estate having the right to recover to his own use all the damage which shall be occasioned to said estate by so much of the height of said dam as shall be above its present height."

After the date of the award and before this conveyance, the dam was carried away by flood; the respondent, in rebuilding it, raised it to a greater height than that established by the referees; and it is to recover damages for the increased flowing occasioned by this raising of the dam that this suit is brought.

It is conceded that the complaint is not brought nor prosecuted for the benefit of Leland, and the respondent contends in his answer that, under the reservation in the deed, the complainant cannot maintain a suit in his own behalf.

Since the filing of the complaint the complainant has obtained a conveyance from Leland of his right to all damages which may have accrued since the 14th of July 1848, from the flowing of the land above the height established by the award, and the right to bring actions therefor in the name and to the use of complainant, together with full authority to prosecute, in his own behalf, the complaint pending against the respondent.

If, upon the foregoing facts, the court are of opinion that this complaint can be maintained, the respondent is to be defaulted and a warrant issue; otherwise the complainant is to become nonsuit.

P. C. Bacon & W. F. Slocum, for the respondent, were first called on, and cited Rev. Sts. *c.* 116, § 8; *Charles* v. *Porter*, 10 Met. 37; *Howard* v. *Proprietors of Locks & Canals*, 12 Cush.

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265; *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 203; *Seymour* v. *Carter*, 2 Met. 520.

D. Foster, for the complainant, cited Gen. Sts. *c.* 149, §§ 6, 8; *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 203; *Hennessey* v. *Andrews*, 6 Cush. 170; *Ballard* v. *Ballard Vale Co.* 5 Gray, 468; *Baird* v. *Williams*, 19 Pick. 384; *Bayley* v. *Bryant*, 24 Pick. 201; *Nelson* v. *Thompson*, 7 Cush. 502.

CHAPMAN, J. The complainant may maintain this process to recover damages occasioned by raising the dam above the height established by the award. The respondent is not by the terms of the award entitled to raise the dam to a greater height than that which is therein established; but it leaves the parties to their legal rights under the mill acts. In the conveyance of Leland to the complainant, no reservation is made of any estate, but merely of the right to receive to his own use such damages as may be recovered by a legal process. But the estate being conveyed, the process must by the statute be brought by the grantee, he being the owner of the estate. The respondent has no interest in the question whether the complainant can retain the damages to his own use, or is obliged to account to Leland for them.

Respondent defaulted; warrant for a jury to issue.

PHILANDER DARLING, Administrator, *vs.* BLACKSTONE MANUFACTURING COMPANY.

Upon the death of the complainant pending proceedings under the mill act, the administrator of his estate may be admitted to prosecute the complaint, and to recover such damages as he might have recovered.

On a complaint under the mill act, a release of damages from a former owner for raising the dam to a less height, or a misdescription of the land in the complaint, must be pleaded and tried in court before the issuing of a warrant, and cannot be given in evidence in mitigation of damages at the trial before a sheriff's jury.

COMPLAINT under the Rev. Sts. *c.* 116. Before a warrant issued for a jury, the complainant died, and the court of common pleas, on motion, allowed the administrator of her estate

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to come in and prosecute the complaint, and at June term 1859 accepted the verdict of a sheriff's jury for the complainant, and the respondents appealed. The case is stated in the opinion.

B. F. Thomas, for the respondents.

G. F. Hoar, for the complainant.

CHAPMAN, J. Hannah Young, the complainant, having deceased before the issuing of the warrant, the complaint is prosecuted by her administrator, and it is contended that nothing can now be recovered but the damages occasioned by the flowing preceding her death. For as the land descends to her heirs at law upon her death, so it is said the claim for the damage done since her decease vests in them as incident to the land, and the administrator has nothing to do with it. It is said to be analogous to the case of a sale of the land flowed, before filing the complaint; in which case the grantor may maintain the process to recover the damages up to the time of his alienation, and for nothing more. *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 203. It is also urged that many inconveniences will arise from allowing the administrator to prosecute the claim for subsequent damages, and to make the election in respect to gross damages. There is much force in some of these objections.

On the other hand, it is urged that the statute contains an unrestricted provision that the administrator may prosecute the suit, and many inconveniences are suggested that would arise from the restriction contended for by the respondents. Some of them are very great.

As the statute does not furnish an express guide, and as there are strong arguments *ab inconvenienti* on both sides, we have endeavored to conform to its spirit. Its object in taking away the common law remedy, as it does in all cases, (*Charles* v. *Monson & Brimfield Manuf. Co.* 17 Pick. 70,) and substituting a complicated process in its stead, is to enable the parties to settle all the various questions, that may arise out of an act of flowing, by a single process, so far as this can possibly be done. The legislature has regarded the water power of our streams as *publici juris;* and it is for this reason that it subjects the interests of agriculture to it, and authorizes mill-owners to flow

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the meadows above them to such extent as it deems advisable, for the purpose of obtaining power to carry on business that is in its nature strictly private, as the manufacture of cloth, or machinery. It not only authorizes the flowing of meadow lands to raise the necessary head of water, but to provide reservoirs so that the mill-owner may avail himself of all the water of the stream to the best possible advantage. On any other principle it would be difficult to sustain the constitutionality of our mill acts. Undoubtedly this policy has done much to increase the population and wealth of the State.

In the present case, we think all the questions may be settled consistently with the rights of all parties. The process may be carried on in the name of the administrator for his own benefit, so far as he is entitled to the proceeds; and for the benefit of the heirs, so far as they are entitled to them. It is no novel thing in our courts that the name of one party is used for the benefit of others. In such cases the rights of interested parties are protected, and they are in some cases allowed to control the suits so that the admissions of the party to the record, or his discharge or other act injurious to their interests, shall have no validity.

It must be most favorable to the mill-owner to have his rights and liabilities determined in a single suit, rather than be subjected to two or more suits, and this is in conformity to the policy of the statute. An argument of some force in favor of this construction of the statute arises from the fact that the claim for damages is not a right or easement in land to be conveyed in writing, nor does it run with the land; but it may be released or waived by parol. *Seymour* v. *Carter*, 2 Met. 520. *Smith* v. *Goulding*, 6 Cush. 154.

It is next contended that evidence ought to have been admitted before the sheriff's jury that the dam of the respondents was raised to a designated point by the Blackstone Canal Company; that a former owner of the premises received and released the damages caused by such erection; and that the rights of the Blackstone Canal Company had been acquired by the respondents. This point has already been determined

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adversely to the respondents. *Howard* v. *Proprietors of Locks & Canals*, 12 Cush. 259. All matters of right should be pleaded in court, and determined before the warrant issues. The object of this precept is to have a jury summoned for the mere purpose of assessing damages, and determining the other questions designated by statute. They are to find the damages for the acts which the warrant sets forth, and decide the other questions which it specifies, and do nothing more.

So if the complaint describes more land than the complainant owns, the matter should be pleaded and determined in court, in order that the warrant may describe the land correctly; for the description in the warrant must be the guide to the jury. The only evidence in respect to title which they can properly hear is that which identifies the boundaries described in the warrant, so that they may find the tract which is to be the subject of their consideration. The evidence offered to show that Mrs. Young did not own a portion of the land described was for this reason properly rejected. *Judgment affirmed.*

David J. Foster *vs.* Frederick Bryant, Administrator.

A parish obtained a subscription to build a meeting-house, to be repaid out of the proceeds of the sales of pews, and appointed five persons a building committee, who accepted the trust, and built the meeting-house, and one of them was appointed treasurer and kept accounts of the business of the committee. Before the building was completed, two of the committee ceased to act, and the business was assumed and carried on by the three other members. The cost of the building exceeded the amount subscribed, and the committee were left in debt for the excess, and by agreement with the subscribers and the parish, and for their own indemnity, had the management of the unsold pews, and paid or settled with the subscribers. One of the acting members of the committee paid a certain sum to the treasurer, to be applied towards paying a debt of the committee. The treasurer afterwards received from the sales and rents of pews and other sources an amount sufficient, after discharging all expenses of the business of the committee, to repay this sum and interest. Neither the third active member of the committee nor the parish made any claim to the surplus. *Held*, that the member of the committee who paid this sum might maintain a bill in equity against the treasurer; but must make the parish and the three other members of the committee parties to the bill.

Bill in equity, alleging that the First Congregational Parish in Petersham, at a legal meeting in 1842, voted to build a meet-

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ing-house, that the funds thereof be raised by a joint stock company with a capital of fifty five hundred dollars, divided into fifty five shares of one hundred dollars each, the amount of which should be repaid to the subscribers out of the proceeds of the sales of pews, and that Abel Howe, William Goddard, Artemas Bryant, William Sanderson and the plaintiff be a building committee to erect the meeting-house, if the shares should be all taken up; that the whole amount of shares was subscribed for and taken up, and the building committee, with the assent of the subscribers, accepted their trust and entered upon the business thereof, and erected and completed the meeting-house within a reasonable time; that before the building was completed and the business relating thereto closed, Howe and Goddard ceased to act in the committee, and the business thereof was assumed and carried on by the other members; that Bryant was appointed treasurer of the committee, and as such had the custody of all the books and papers pertaining to the building of the meeting-house, and the care and management of all funds in connection therewith, and kept full accounts; that the committee, relying upon the funds raised by subscription, made use of their personal credit and incurred personal responsibilities in making contracts for the building; that the cost of building overran the estimate and exceeded the subscriptions by the sum of five hundred dollars and upwards, and the committee were left in debt for the excess; that after the meeting-house was completed the committee, with the assent of the parish and of the subscribers, caused the pews therein to be appraised and put upon sale at prices the whole amount of which was sufficient to cover the whole cost of the house, and sold some, but not all of the pews; that with the consent of the parish and the subscribers it was arranged that the committee should have the management of the unsold pews for their own indemnity and the benefit of all interested therein, and the committee by their treasurer did so; that in 1846 the plaintiff paid to the treasurer the sum of two hundred dollars to be applied towards the payment of an outstanding debt for work done on the house; that the treasurer acted as such from the

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time of his appointment until his death in 1858, and during that time received from the subscribers and from the sales and rents of pews and other sources a large amount of money, sufficient, after paying and satisfying himself for all his payments in the business of the committee, to repay to the plaintiff the sum of two hundred dollars and interest; and that his books and papers, if they contained a true account, would show that fact; that the subscribers to the building fund had been paid or settled with, and had relinquished all their interest in the stock; that neither they, nor the parish, nor Sanderson, made claim to the moneys so left in the treasurer's hands; that the treasurer kept open accounts current with his several associates, containing items for rents received for pews within six years before his death and the filing of this bill; that the defendant had been appointed administrator of his estate, and that each of them had refused to account with the plaintiff. The bill prayed for an account, a discovery, and an order for the payment to the plaintiff of the sum justly and equitably due him.

The defendant demurred to the bill, because it did not show any sufficient cause or ground of action against the defendant, in law or in equity; because the plaintiff had a plain, adequate, and complete remedy at common law, if at all; and because he had not joined as defendants the parish, and Howe, Goddard and Sanderson, the other members of the building committee.

D. Foster, for the defendant, cited Adams on Eq. 319 *& seq.*

P. C. Bacon, (*I. Stevens* with him,) for the plaintiff, cited Rev. Sts. *c.* 118, § 43; Gen. Sts. *c.* 113, § 2; *Bartlett* v. *Parks*, 1 Cush. 85; *Towle* v. *Pierce*, 12 Met. 332; *New Braintree* v. *Southworth*, 4 Gray, 306; *Raynham Congregational Society* v. *Trustees of Fund in Raynham*, 23 Pick. 148.

Chapman, J. The members of the committee who jointly assumed the responsibility of carrying on the work were partners in respect to it, and the plaintiff's remedy is in equity. But it does not appear that those members or the parish have released their interest in the funds held by the defendant's intestate, and therefore they ought to be made parties.

Demurrer sustained for want of parties only.

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Ebenezer B. Walker *vs.* Inhabitants of Orange.

County commissioners laid out a road and ordered a town to build it. A man agreed with the town to build the road in accordance with the order and to the acceptance of the commissioners, for a specified price. The commissioners refused to accept the road as completed by him, and, after he had sued the town, ordered additional work to be done upon it, for which the town was obliged to pay. *Held*, that he could not be permitted to show that their refusal was unreasonable; but that if he left the road without fraud or wilful default, believing it to be completed as required by his agreement, he was entitled to recover from the town the fair value to the town of his labor and materials; and that such value would be the price agreed, less the amount paid by the defendants for the additional work ordered by the commissioners.

Action of contract. Trial in the superior court before *Wilkinson*, J., to whose rulings the defendants alleged exceptions. The case is stated in the opinion.

C. Devens Jr. & G. F. Hoar, for the defendants, cited *McCarren* v. *McNulty*, 7 Gray, 139; *Hayward* v. *Leonard*, 7 Pick. 181; *Olmstead* v. *Beale*, 19 Pick. 528; *Faxon* v. *Mansfield*, 2 Mass. 147; *Taft* v. *Montagne*, 14 Mass. 282; *Snow* v. *Ware*, 13 Met. 42; *Kettle* v. *Harvey*, 21 Verm. 301; *Hayden* v. *Madison*, 7 Greenl. 76; 2 Parsons on Con. 35; Rev. Sts. *c.* 24, §§ 7, 10, 44, 45.

F. H. Dewey & H. Williams, for the plaintiff, cited Rev. Sts. *c.* 24, §§ 44, 45; *Chapman* v. *Lowell*, 4 Cush. 378; Bul. N. P. 139; *Hayward* v. *Leonard*, 7 Pick. 181; *Snow* v. *Ware*, 13 Met. 42; *Bassett* v. *Sanborn*, 9 Cush. 58; *Smith* v. *Lowell Meetinghouse*, 8 Pick. 178; *Brewer* v. *Tyringham*, 12 Pick. 547; *Veazie* v. *Hosmer*, 11 Gray, 396.

Chapman, J. This action is brought upon an agreement made by the plaintiff with the defendants to construct a certain road which had been laid out by the county commissioners, and ordered to be made by the defendants in the manner specified in their order, and to their acceptance. The agreement was made by a bidding at a public auction, and the plaintiff agreed to do the work according to the order and to the acceptance of the commissioners. He thus assumed the whole obligation of the defendants.

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The plaintiff was allowed to introduce evidence at the trial that he had completed the road according to the order, and that the commissioners had unreasonably refused to accept it; and the jury were instructed that, if they should find that it had been thus built, and that the commissioners had unreasonably refused to accept it, the plaintiff could recover the whole contract price.

By this instruction, the jury were made a tribunal to pass upon the reasonableness of the decision of the commissioners, and to substitute their own judgment for the judgment of the commissioners; the plaintiff was released from that part of his contract which bound him to do the work to the acceptance of the commissioners; and the decision, instead of enforcing the contract as the parties had made it, substituted a new stipulation, namely, that the road should be completed to the acceptance of a jury. But the statute expressly makes the commissioners the tribunal to decide finally the question whether the work ought to be accepted. Rev. Sts. *c.* 24, §§ 44, 45. And though the decision releases the plaintiff, it still leaves the town under an obligation to comply with the decision of the commissioners. The ruling was erroneous, and the evidence ought not to have been received, nor any inquiry permitted into the reasonableness of the conduct or decision of the commissioners. It may be remarked that the law has wisely left this question to be decided by the commissioners, who have knowledge of the circumstances and can inspect the work, whereas a jury must ordinarily derive all their knowledge from the statements and opinions of witnesses on the stand.

But though the plaintiff is not entitled to recover the contract price, not having fully performed his contract, yet he is entitled to recover for what he has done.

This case is quite analogous to that of *Hayward* v. *Leonard*, 7 Pick. 181, and other similar cases, where the plaintiff has made a contract with the defendant to build a house or other structure upon the defendant's land in a specified manner, but has without fraud or wilful default failed to perform the contract fully. In such cases, it is held that he can recover for the

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value of his work and materials, subject to the limitations specified in the cases, because the defendant has had the benefit of the work and materials.

But it is unlike the case of *McCarren* v. *McNulty*, 7 Gray, 139, and other cases of the same class, where the plaintiff has agreed to construct and deliver to the defendants a specified article of personal property, which is to be made to the acceptance of the defendant or some other person named in the agreement. In such cases, the article, not being accepted, remains the property of the plaintiff, and he has not performed his contract, nor has the defendant derived any benefit from what he has done. He ought not therefore to recover anything.

In this case, it appeared at the trial that since the date of the writ the county commissioners had, after causing additional work to be done, for which they charged the defendants the sum of $54, accepted the road. If we assume, as we are bound to do, that the contract price between these parties was reasonable, it appears that the plaintiff's work has been worth to them just the contract price, less $54. This balance has been as beneficial to them as if it had been paid in cash towards making the road; and the work has actually been accepted to that extent by the tribunal which by law and by the terms of the contract had authority to accept it. The $54 having been remitted by the plaintiff, the verdict ought to stand; for the work had been done before the commencement of the action, and the plaintiff had been guilty of no fraud or wilful default, but had left his work several months before bringing the action, believing it to be finished, and had given notice to the commissioners and requested them to view and decide upon it. If the road had not been completed or accepted at the time of the trial, the rule of damages would have been somewhat different. The evidence of facts that occurred subsequently to the commencement of the action related merely to the amount of the damages to be recovered, and was properly admitted.

On the plaintiff's remitting $54, exceptions overruled

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Ladies' Collegiate Institute *vs.* William A. French.
Same *vs.* Joel Snow.
Same *vs.* George W. Banker.
Same *vs.* Joseph Hockey.

The implied promise of the promisee to hold and appropriate the funds subscribed, in conformity with the terms and objects of the subscription, is a sufficient legal consideration for the promise of a subscriber to a fund for the endowment of a corporation created for charitable purposes.

The corporators named in a charter from the legislature, establishing a charitable corporation at Amherst, elected twelve associates, and organized themselves as a corporation. A year afterwards the charter was amended by the legislature so as to permit the location of the corporation either at Amherst or such other place as the corporation should select; and a meeting of the original corporators was called, at which they elected twelve associates, retaining some and leaving out others of those elected before, reorganized the corporation, and located it at Worcester, where its business was afterwards carried on. *Held*, that the power of the corporators to organize was not exhausted by their first organization, but that for real or supposed errors therein they might reorganize; that if the associates originally elected acquiesced, the reorganization was valid; that the corporation as reorganized might maintain actions on agreements to subscribe certain sums for its endowment, payable to the treasurer of the corporation, describing the institution as "to be located at Amherst, as provided by the charter, or in some other suitable place, subject to the action of its legal trustees, with the consent of the general court," whether signed before or after the second organization and the location at Worcester; and that a condition of such agreements, that no subscription should be binding unless the sum of twenty thousand dollars should be subscribed before a certain date, was complied with by subscriptions to that amount, either in the same form, or "towards its two hundred thousand dollars endowment, provided it is to be located at Worcester," although the sum last named had not been obtained.

Actions of contract to recover sums of money severally subscribed by the defendants. At the trial in the superior court, the cases appeared to be in substance as follows:

By *St.* 1854, *c.* 342, which took effect on the 21st of April 1854, three persons named, with their associates and successors, were incorporated "by the name of the Ladies' Collegiate Institute, to be established in the town of Amherst, for educational purposes," with all the powers and liabilities set forth in the Rev. Sts. *c.* 44. On the 6th of June 1854 the three persons named in the charter, together with twelve others whom they elected as their associates, held a meeting and organized the corporation by the choice of officers, and these persons con-

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tinued for about a year thereafter to act as an organized corporation under the name of the Ladies' Collegiate Institute.

By St. 1855, c. 174, which took effect on the 14th of April 1855, the St. of 1854, c. 342, "is so amended that the said Ladies' Collegiate Institute may be located in the town of Amherst in the county of Hampshire, or in such other town or city in this commonwealth as may be selected by said corporation." In July 1855 a call was published for a meeting of the three corporators named in the act, alleging that the organization of 1854 had been informal; and a meeting was held on the 24th of July 1855, at which the corporation was organized according to the provisions of the Revised Statutes, and the three corporators elected twelve associates, retaining some and leaving out others of those elected at the first organization. These actions were brought by direction of the officers chosen since the second organization.

In September 1855 the plaintiffs bought land and buildings in Worcester, for which they paid $46,000, and before September 1856 they expended $10,000 in fitting up and furnishing the buildings, and in 1857 they built additions at a cost of $20,000. The subscriptions were the only means which the plaintiffs had for defraying these expenses. The school was opened on the 3d of September 1856, and has ever since continued to be maintained, and preference in admission given to daughters of subscribers.

Before the 1st of August 1855 there had been obtained subscriptions to the amount of $15,000 to the first, and of the further amount of $18,000 to the second, of the following papers:

"We whose names are subjoined, desirous of making more ample provision for female education, agree to pay the amount attached to our names to the treasurer of the Ladies' Collegiate Institute, an institution incorporated by the last legislature of this commonwealth, to be located in Amherst, Mass., as provided by the charter, or in some other suitable place, subject to the action of its legal trustees, with the consent of the general court. The conditions of this agreement are such that no sub-

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scriber shall be holden to pay the amount of his subscription, unless the sum of twenty thousand dollars shall be subscribed for the endowment by the first day of August 1855. But subscriptions may be collected as soon as twenty thousand dollars have been subscribed. Boston, December 6th 1854."

"We whose names are subjoined agree to pay the sum attached to our names to the treasurer of the Ladies' Collegiate Institute towards its two hundred thousand dollars endowment by the 1st of August 1855, provided said college is to be located in the city of Worcester. Worcester, March 5th 1855."

The defendant French, in February or March 1856, subscribed $40 to the first of these papers, and received at the same time a memorandum from the treasurer that he was to pay this amount in four equal annual instalments, the first of which should be paid on the 1st of August 1856; and in October, being asked to pay that instalment, signed this note: "In consideration of the location of the Ladies' Collegiate Institute in the city of Worcester, I promise to pay ten dollars to the treasurer of said institution or his order on October 13th 1856, and interest after due. Cambridge, October 4th 1856."

The defendant Snow subscribed to the first paper $16 before the 24th of July 1855, $50 in the summer of 1856, and $42 in the fall of 1856; received at the times of his second and third subscriptions memoranda like that given to French; and paid two of the annual instalments on his first, and one on his second subscription.

The defendant Banker, before the 24th of July 1855, subscribed to the same paper $40, and paid $10 thereof, and $10 more in August 1856; and in September 1856, brought a relative to Worcester, who entered the school, and the officers of the institution then made a full statement to him of their plans and affairs.

The defendant Hockey, in the winter of 1856 – 7, subscribed $50 to a paper dated October 1856, by the terms of which the subscribers "in consideration of the establishment in the city of Worcester of the Ladies' Collegiate Institute" agreed to pay to its treasurer the amounts subscribed by the 1st of March

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1857; received a writing, allowing him to pay his subscription in four semiannual instalments of $12.50, the first to be paid in March 1857; and then paid the first instalment.

Each of the defendants refused on demand to pay the remainder of his subscription.

The defendants offered no evidence, but contended that upon these facts the plaintiffs had not made out a case which would warrant a verdict against either of them. *Allen*, C. J. overruled the objections, verdicts were rendered for the plaintiffs, and the cases reported to this court.

G. F. Hoar & A. A. Ranney, for the defendants. The right of the corporators named in the charter to organize the corporation was exhausted by the first organization, and the second was unauthorized and of no effect. By the original act and the proceedings under it the corporation was organized and established at Amherst, and could not be removed without a vote of the corporation. All the acts done at Worcester and the expenditures there were therefore unauthorized. The defendants contracted with a corporation at Amherst, and the corporation at Worcester is not a party to the contract.

The contract of subscription is void for want of mutuality and of consideration. *Phillips Limerick Academy* v. *Davis*, 11 Mass. 113. *Farmington Academy* v. *Allen*, 14 Mass. 172. *Boutell* v. *Cowdin*, 9 Mass. 254. *Bridgewater Academy* v. *Gilbert*, 2 Pick. 579. *Hamilton College* v. *Stewart*, 2 Denio, 403, and 1 Comst. 581. *Ives* v. *Sterling*, 6 Met. 310. *Foxcroft Academy* v. *Favor*, 4 Greenl. 382. 1 Parsons on Con. 378.

The condition of the promises of French, Snow and Banker was not performed, because $20,000 was not subscribed before the 1st of August 1855. The subscriptions for $18,000 should not be included in the reckoning; because they were upon a different condition, preventing the free action of the trustees in regard to the location, and requiring the institution to be absolutely located at Worcester; and because they were upon the further condition that the whole $20,000 should be subscribed before any part should be valid.

A subscription, like the original one of French, to an institu-

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tion "to be located" in the future, made after it has in fact been located, cannot be carried out so as to give each party his rights, and has no validity as a contract. *People's Ferry* v. *Balch*, 8 Gray, 303.

Part of Snow's subscription, and all of Banker's, stand upon still stronger grounds, because made before the organization at Worcester.

French's note was but a renewal in part of a void instrument, and therefore had no validity, or was, at most, valid for that part only. The location of the institute at Worcester, if legal, was no consideration for this note, or for Hockey's subscription, because it was a past or executed consideration. Chit. Con. (8th Amer. ed.) 61 & note. *Dearborn* v. *Bowman*, 3 Met. 155.

F. H. Dewey, for the plaintiffs.

CHAPMAN, J. The signatures of the defendants to the subscription papers declared on being admitted, the defendants object that those who prosecute this action have no right to do so under the *St.* of 1854, *c.* 342, by which the institute was chartered, and the *St.* of 1855, *c.* 174, by which the corporators were authorized to locate it at such place as they should select. The objection rests upon the fact that on the 6th of June 1854 the three corporators named in the first act met, together with twelve other persons whom they elected as their associates, and organized the corporation by the choice of officers; and that they afterwards proceeded to act as an organized corporation for about a year. It is contended that the power of the corporators to organize under the charter was thereby exhausted; and therefore there could be no new organization that would be valid.

It appears that in July 1855 the corporators called a meeting in a formal manner, alleging that their proceedings had thus far been informal. This meeting was held on the 24th of July, and they then organized conformably to the provisions of the Revised Statutes, and elected twelve associates, some of whom were the same that had been previously elected, and others were not. They have ever since acted under this organization, without any objection on the part of the members who were not re-elected as associates, so far as appears; they have held

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and managed the property of the corporation, and this action is brought by their authority.

The book containing the minutes or record of the first organization and the proceedings under it exhibits great irregularities and lack of skill in conducting such matters. But whether the defects were such as to render the proceedings void, it is not necessary to determine; for we are of opinion that if the corporators and their associates, fearing that there might be some question respecting the validity or regularity of their acts, chose to reorganize, they might legally do so, and thus correct their real or supposed errors. And if some of the original associates were omitted in the new organization, and others were elected in their stead, the identity of the corporation would not thereby be changed, nor would other persons have a right to complain, if the original associates acquiesced, as they seem to have done. The franchise is not a mere naked power, as the defendants contend; it is rather a property, to be held and managed for the purposes indicated in the charter during the term for which it is granted, unless it is forfeited and taken away at an earlier period.

The second objection is that the promises of the defendants, being mere subscriptions to the funds of the institute, are without consideration, and therefore void. Subscriptions of this character have been made the subject of litigation in many instances; and the earlier cases in our reports contain *dicta* some of which have not been sanctioned by later decisions. But in the cases of *Amherst Academy* v. *Cowls*, 6 Pick. 427, *Williams College* v. *Danforth*, 12 Pick. 541, and *Thompson* v. *Page*, 1 Met. 565, their validity is established, and the ground of it is definitely stated. It is held that by accepting such a subscription the promisee agrees on his part with the subscribers, that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well settled principle in respect to concurrent promises.

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In the present cases, the defendants' promises were accepted by the plaintiffs before there was any attempt to revoke them, and the plaintiffs have established the school and maintained it to the present time. Failure of a consideration originally good is not pretended, and there exists ample power to regulate and enforce the trust assumed by the plaintiffs for the future. The location at Worcester was legal under the amended charter, and none of the defendants show any just cause on their part to complain of the expediency or propriety of this location.

Judgments on the verdicts for the plaintiffs.

Seth F. Allen *vs.* Enoch Leonard.

A. contracted in writing to furnish materials and build a house for B. for a certain sum, to be paid by B. After A. had entered upon the performance of his contract, C. agreed to pay him according to his contract with B. if he would go on and finish the house. *Held*, that C. was liable to A. for all work done and materials furnished after C.'s undertaking, although A. had previously commenced proceedings against B. to enforce a claim for a mechanic's lien on the house for labor and materials. *Held, also*, that after C. had introduced evidence of the proceedings to enforce this lien, as tending to show that A. believed that his claim was against B. alone, A. might introduce evidence that at the time of making that claim he spoke to his counsel in those proceedings about his claim on C. *Held, further*, that C. could not introduce evidence that he was a person of large property and in good credit, without other evidence that these facts were known to A.

Action of contract upon an account annexed to recover $460.27 for labor and materials in building a house. Trial in the court of common pleas, before *Sanger*, J.

The plaintiff testified that in August 1855 he made a written contract with L. H. Leonard to build a house for him, supply the materials, and finish it on or before the 1st of March following, for which Leonard agreed to pay him $550; and that after having put up part of the frame of the house and done some work, the defendant agreed to pay him according to the contract, if he would go on and finish the house. The defendant denied that he had ever made any agreement with the plaintiff, and contended that L. H. Leonard was the only person liable to the plaintiff.

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The defendant, for the purpose of showing that the plaintiff had always considered his claim to be against L. H. Leonard, introduced in evidence a claim for a mechanic's lien, made on oath by the plaintiff on the 13th of March 1856 on the written contract, against L. H. Leonard alone; and also a petition for the enforcement of that lien against L. H. Leonard, filed at June term 1856. To rebut this ground of defence, the plaintiff was allowed, against the defendant's objection, to prove that at the time of filing that claim he spoke to his counsel about a claim on this defendant therefor.

For the purpose of showing that the plaintiff did not consider that he had any claim against the defendant, the defendant offered evidence that he was pecuniarily responsible, and had abundant real and personal property open to attachment, at the time when the plaintiff made said claim and petition. It appeared that the plaintiff and defendant resided thirty miles apart, and no evidence was introduced or offered that the plaintiff had any knowledge of the defendant's condition as to property. The evidence offered was excluded.

The defendant requested the court to instruct the jury, that if they were satisfied, upon the evidence, that the agreement between the plaintiff and defendant under which the materials were furnished and labor was performed was that the plaintiff should go on and complete the contract he had made with L. H. Leonard, and that the defendant should perform the contract on the part of L. H. Leonard, and the plaintiff had performed his part of the contract, yet the plaintiff could not recover in this action. The court declined so to instruct the jury, but instructed them that under these circumstances the plaintiff could recover. The verdict was for the plaintiff, and the defendant alleged exceptions.

F. H. Dewey & E. B. Stoddard, for the defendant.

P. C. Bacon, for the plaintiff.

Bigelow, C. J. 1. The validity of a contract similar to the one relied on by the plaintiff in the present case was affirmed on full consideration in *Rand* v. *Mather*, 11 Cush. 1. The bill of exceptions does not show that the plaintiff claimed to recover

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for any labor done or materials furnished in the erection of the building under the written contract prior to the agreement alleged to have been made by the defendant. Nor does it appear that anything was included in the sum found by the jury, except that which was supplied on the faith of the defendant's agreement. The facts stated to have been proved at the trial are somewhat indefinite on this point, but we cannot presume, in the absence of any statement to that effect, that the plaintiff was allowed to recover for items of charge which constituted a valid debt of a third person. The inference that the plaintiff did not claim to recover for that which was done under the written contract prior to the agreement entered into with the defendant is strengthened by the fact that the amount of his demand as set out in the account annexed is much less than the original contract price. It was a case in which the written contract was abandoned by the plaintiff, and he refused to continue the work or furnish materials under it. The agreement of the defendant was the sole consideration on which the plaintiff proceeded and completed the building.

2. The evidence of the plaintiff's statement at the time of filing his claim for a lien against L. H. Leonard was competent. It tended directly to rebut the inference which the defendant sought to draw from the fact that such lien had been claimed by the plaintiff, and being a part of the same transaction put in evidence by the defendant, it was admissible as *res gestæ*.

3. Evidence that the defendant was a person possessed of large property and in good credit was immaterial, because it was not accompanied by proof, or by any offer to show facts from which it could be inferred, that the pecuniary condition of the defendant was known to the plaintiff.

Exceptions overruled.

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ISAAC GODDARD & others *vs.* JOHN BARNARD.

In an action for the breach of a contract in writing, by which the defendant agreed to cover the roof of the plaintiff's building, and to warrant the same to stand well and resist the water and make a tight roof for the term of five years, and in default thereof to make the same satisfactory to the plaintiff, the plaintiff can recover no damages for injury to the interior of his building or to articles stored there, caused by water leaking through the roof constructed by the defendant; but only the cost of having the roof put into a satisfactory condition.

ACTION OF CONTRACT upon this agreement in writing: "For and in consideration of six hundred and thirty eight $\frac{77}{100}$ dollars to me paid for covering two roofs for Goddard, Rice & Co. with slate and composition, I do hereby agree to warrant the same to stand well and resist the water so that it shall make a tight roof for the term of five years from this date, and in default therefor I promise to make the same to them or their successors satisfactory, not happening through any fault of Goddard, Rice & Co. or their successors. Worcester, November 8th 1856.

"John Barnard."

Trial in the superior court, before *Vose*, J., who signed the following bill of exceptions:

"The plaintiffs offered evidence that the defendant constructed the roofs referred to in November 1856; that early in the spring of 1857 the roofs began to leak, and that a considerable quantity of water passed through the same at the time of every heavy rain until November 1859, six months after the date of the writ, when the plaintiffs removed the roofs and constructed others; that the defendant was notified of such leaks from time to time as they occurred, and went many times upon the roofs and endeavored to repair the same; and that it was known to both parties at the time of the contract that the substance of which the roofs were in part composed was a new invention which had been little tried or used; and no bad faith or negligence in the original construction of the roof was imputed to the defendant.

"The plaintiffs further offered evidence tending to show that they were largely engaged in business, in the buildings covered

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by such roofs, as manufacturers of machinery; that they had valuable machinery in operation therein, and valuable machinery stored there for sale, and that these facts were known to the defendant when he made the contract and constructed the roofs; that said machinery was injured by rain in consequence of such leaks, and the plaintiffs' workmen at various times driven from their work by the same, and their business seriously interrupted. This evidence was admitted, the defendant objecting.

"The defendant requested the court to instruct the jury that the plaintiffs could only recover in damages the difference in value between the roof actually on the building and such a roof as the contract required; and that the plaintiffs could not recover anything beyond the fair value of such a roof as the defendant had engaged to provide.

"The court declined so to instruct the jury; but instructed them, that the defendant had a right, under this contract, to make tight and remedy defects in the roof as originally constructed, by any mode which did not materially change the character and durability and safety of the roof contracted for; that if they were satisfied that the roof as originally constructed did not answer the requirements of the guaranty, and could not be made to by any such mode of repairing, which ought to be reasonably satisfactory to the plaintiffs, and that the roof was so defective that the leaks caused a material and substantial annoyance and injury to the plaintiffs and their property in the prosecution of their business, they had a right to remove the same; that in such case they might recover the difference between the price or value of the roof actually constructed and that contracted for; that the plaintiffs might further recover for any injury to their building or their fixed machinery, or machinery stored for sale, caused by leaks, and for the interruption of their business and loss of time of their men occasioned thereby.

"The jury found a verdict for the plaintiffs for $684.48. They were directed by the presiding judge to assess separately the different items of damage, and returned that they assessed for the plaintiffs damage sustained by the interruption of their business, $109; for the injury to the building, $30; and for the

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injury to the machinery and personal property, $75.87. To the foregoing rulings the defendant excepts."

G. F. Hoar, for the defendant.

P. C. Bacon, for the plaintiffs, cited *Snow* v. *Ware*, 13 Met. 50; *Hayward* v. *Leonard*, 7 Pick. 181; *Gleason* v. *Smith*, 9 Cush. 484; *Bartlett* v. *Blanchard*, 13 Gray, 430; *Dewint* v. *Wiltse*, 9 Wend. 325; *Blanchard* v. *Ely*, 21 Wend. 342; *Freeman* v. *Clute*, 3 Barb. 424; Sedgwick on Damages, (2d ed.) 90.

CHAPMAN, J. The contract on which this action is brought is very general in its terms, and they are expressed loosely and inaccurately. But it contains a provision that must regulate the measure of damages for a breach of it. The roof, having been made, is warranted to stand well and resist the water, so that it shall make a tight roof, for the term of five years, and in default thereof, the defendant promises to make it satisfactory to the plaintiffs. Upon a breach of this agreement the plaintiffs were entitled to have a satisfactory roof made at the expense of the defendant, or to recover the amount that such a roof would cost. This is all the damage that the language of the contract contemplates. The evidence shows that the roof was composed of a newly invented substance, that had not been thoroughly tested, and that it was regarded by both parties as an experiment. This circumstance, and the amount paid for the roof, tend to confirm the idea that the defendant did not intend to guaranty the plaintiff against the more remote damages that they might be exposed to in the prosecution of their business, and injury done to articles that might be stored in the building, by reason of defects in the roof.

As a general rule of damages for the breach of special contracts, that of the civil law is safe and just. "In general the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby." 1 Pothier on Obligations, pt. 1, *c.* 2, art. 3. The cases of *Hadley* v. *Baxendale*, 9 Exch. 341, and *Fox* v. *Harding*, 7 Cush. 516, adopt this rule in substance. In

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the present case, it would lead us to the same result that the language of the parties has done. If the plaintiff will remit $214.87, being the amount allowed for the three items of special damage, the verdict is to stand; otherwise, it must be set aside, and a *New trial granted.*

MARTIN L. NEWTON *vs.* CHARLES WINCHESTER & another.

The parties to a written contract for the sale of a quantity of standing timber, to be cut and delivered within a certain time at a certain place and paid for in six months after delivery, agreed afterwards in writing to postpone the time for cutting and delivering the timber, except a portion already at the place of delivery, and an additional portion already cut and to be delivered on request; and these portions were afterwards delivered. *Held*, that the original contract was thereby severed, and that after six months from such delivery an action might be maintained on the original contract for the price of both these portions.

ACTION OF CONTRACT to recover the price of certain timber. Writ dated February 8th 1859. The case was submitted to the judgment of the court upon the following facts:

On the 27th of May 1857 the plaintiff agreed in writing with the defendants to deliver all the oak timber standing on certain wood lots "on board the cars of the Cheshire Railroad Company at Marlborough depot, prior to April 1st next, at six dollars a cord, payment to be made in six months after delivery." By an indorsement on this agreement, the plaintiff, on the 17th of February 1858, at the request of the defendants, agreed to delay until the 1st of April 1859 the delivery of all the timber, "excepting what is now put on cars, being four car loads, and about ten cords at Marlborough depot, which is subject to the depot-master's order for delivery," and also "about thirty five cords cut, which he agrees to put on cars at any time specified by said Winchesters," and to leave the rest standing until September 1858. The four car loads and forty five cords, the delivery of which the plaintiff did not agree to delay, were all delivered to the defendants by the 10th of May 1858, and a part of the agreed price having been paid to the plaintiff in the fol-

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lowing October, this action was brought to recover the balance. No part of the rest of the timber was ever delivered.

G. H. Whitney, for the plaintiff, cited *Perkins* v. *Hart*, 11 Wheat. 250, 251; *Robinson* v. *Green*, 3 Met. 159; 2 Smith's Lead. Cas., Amer. notes to *Cutter* v. *Powell*.

C. H. B. Snow, for the defendants. The contract is entire, and nothing is due till six months after the delivery of all the timber. *Oxendale* v. *Wetherell*, 9 B. & C. 386. *Shipton* v. *Casson*, 5 B. & C. 378. *Giles* v. *Edwards*, 7 T. R. 181. *Clark* v. *Baker*, 5 Met. 452. *Paige* v. *Ott*, 5 Denio, 406. If any part was severed by the indorsement, it was only the timber then at the depot.

DEWEY, J. This action may be maintained, notwithstanding the objection that the whole timber had not been delivered when the action was brought. By the supplemental agreement of 17th February 1858, the contract ceased to be an entire one, and the new contract postponing the performance of a certain portion of the original contract does not prevent the recovery for the timber that is the subject of the present action. For this timber, to the extent that it remains unpaid for, the plaintiff may recover in this action.

Judgment for the plaintiff.

WALDO WALLACE *vs.* WALTER HEYWOOD CHAIR COMPANY.

A written order for the payment of a certain sum out of his wages, drawn, for a sufficient consideration, by a workman, employed under a subsisting engagement for a certain time, upon his employer, and by the latter "accepted, payable when earned," applies to wages earned under a new engagement entered into by the workman immediately upon the expiration of the first for lower wages with the same employer; and is not defeated by a subsequent assignment to another person of the wages to be earned under the new engagement.

ACTION OF CONTRACT upon an order drawn by James Ahern upon the defendants and by them accepted. The case is stated in the opinion.

C. H. B. Snow, for the plaintiff.

J. W. Mansur, for the defendants.

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DEWEY, J. The present case differs somewhat from *Mulhall* v. *Quinn*, 1 Gray, 105, and cases of like nature, where assignments of future earnings, without any present subsisting engagement under which the wages were to be earned, have been held invalid. The drawer of the order was, on the 5th of February 1858, when it was drawn and accepted, in the service of the defendant, the acceptor. It was an order on the defendant "to pay to Waldo Wallace fifteen dollars, and charge the same to my account." It is agreed that orders prior in time had been accepted, sufficient to exhaust all the earnings prior to the 3d of April. The drawer continued in the service of the acceptor without any intermission to the commencement of this action, and for a period long enough to create the liability attaching to the acceptance of defendant, "accepted, payable when earned," unless the facts stated as to the original contract extending by its terms to the 1st of April only bring this case under the doctrine, that there can be no valid assignment of future earnings where no agreement exists as to such services at the time of the assignment. Such would have been the case here, had the drawer originally entered into the service of the defendant after the 1st of April, under a contract made subsequently to the date of the order, and this were to be considered a mere assignment of wages to arise under a future contract. The language of this order was "to pay to Waldo Wallace fifteen dollars, and charge the same to my account." We think this order may properly be held as attaching to all the earnings of the drawer during the continuous service of the drawer for the defendant. The extension of the time of the service beyond the 1st of April, and at a reduced rate of wages, did not break the continuity of the service. If the drawer thus continued in the same service after the 1st of April, the amount accruing therefor was properly applicable to this order. The laborer had no right to transfer to another person the avails of that subsequent service, or the indebtedness of the defendant therefor, without the assent of the defendant after giving this order. Notice to him of such subsequent assignments would not supersede his right to apply it on this prior order. He might, as the plaintiff's order directs,

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"charge the same to the account" of the laborer. The drawer continuing to labor in his service, the amount of the order may properly be deducted from the indebtedness for the same. The defendant had, by his acceptance of the order, become liable to pay the amount to the plaintiff, when earned. It was by the words of acceptance "payable when earned," without reference to any particular contract. It was held to be immaterial that the workman was employed to work by the piece, if he was uninterruptedly in the employ of the defendant, in the case of *Hartley* v. *Tapley*, 2 Gray, 565; or that he worked from day to day, and was hired for no specific time. *Taylor* v. *Lynch*, 5 Gray, 49. *Lannan* v. *Smith*, 7 Gray, 150. These latter cases indicate a disposition to relax the rule of confining the validity of such an order and acceptance thereof to cases where there is a specific and definite agreement for labor existing between the parties, in case the party is at the time actually in the service of the acceptor. *Judgment for the plaintiff.*

THOMAS H. MULLIGAN *vs.* DANIEL F. NEWTON.

The exemption by *St.* 1857, *c.* 285, from attachment and execution of "provisions necessary, procured and intended for the use of the family of the debtor, not exceeding fifty dollars in value," extends to corn, potatoes and cabbages planted and raised by the debtor for the use of his family, and ripe for harvest, though not severed from the soil.

ACTION OF TORT for the conversion of a quantity of corn, cabbages and potatoes, attached by the defendant as a deputy sheriff on mesne process against the plaintiff.

At the trial in the superior court, there was evidence tending to show that the corn, cabbages and potatoes were raised by the plaintiff in a field occupied by him in Southborough; and, when attached by the defendant, were ripe and fit to be harvested, but had not yet been severed from the soil. The plaintiff testified that, at the time of the attachment, he had but few provisions in his house for the use of his family, which consisted of seven persons; and that he had planted and raised

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these vegetables for their use, intending to sell any surplus which they might not need. *Allen*, C. J. instructed the jury that if the vegetables attached by the defendant were produced, designed and intended by the plaintiff to be used as provisions for his family, so much of them as would not exceed in value the amount remaining after deducting from fifty dollars the value of the provisions which the plaintiff had in his house was exempt from attachment. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. C. Bacon, for the defendant.

T. G. Kent, for the plaintiff.

Dewey, J. These articles were attached by the defendant as personal property, and must so be deemed between these parties. The cases of *Penhallow* v. *Dwight*, 7 Mass. 34, and *Heard* v. *Fairbanks*, 5 Met. 111, are to the point, that corn or other annual product of the soil, raised by cultivation, is to be considered personal property when ripe for harvesting.

The further question is, whether these articles, in the state in which they were found at the time of the taking, were liable to be attached, or were by law exempt therefrom. The St. of 1857, c. 235, exempts "provisions necessary, procured and intended for the use of the family of the debtor, not exceeding fifty dollars in value." We think it would be too narrow a construction of this statute to hold that vegetables raised by cultivation and adapted to the wants of the family, and actually planted and raised as and for provisions for the family, were not to be exempted until actually harvested and placed in the cellar. Whether such was the state of these articles, and whether they were planted and raised to supply the necessities of the family, was submitted to the jury under proper instructions.

This construction will be found fully authorized by the course of former decisions of this court. We will refer to two cases only; that of *Gibson* v. *Jenney*, 15 Mass. 205, where, under an exemption of "one swine," the court held the exemption extended to the body of the animal after it was killed and while being prepared for family use, upon the ground that the humane purposes of the statute so demanded; and the case of *Rich-*

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ardson v. *Buswell*, 10 Met. 506, where it was held that the exemption in the statute "of necessary wearing apparel" embraced a piece of cloth and trimmings left by the debtor at a tailor's shop to be made into a coat, the same being necessary for his use. *Exceptions overruled.*

BENJAMIN D. MAXHAM *vs.* JONATHAN DAY.

An article of personal ornament cannot be taken on a writ of replevin from the person of the defendant, without his consent, even if worn by him for the sole purpose of keeping it beyond the reach of legal process.

ACTION OF TORT against a deputy sheriff for refusing to serve a writ of replevin, sued out by the plaintiff against George Spring, to recover possession of a diamond pin with gold settings.

At the trial in the superior court, it appeared that, when the officer was asked to serve the writ of replevin, Spring was wearing the pin as a personal ornament in the bosom of his shirt, with his coat buttoned over it so as to conceal it from sight, and threatened resistance if the officer should attempt to take it from him. *Lord*, J. ruled that these facts did not excuse the officer, and he alleged exceptions.

H. Williams, (*F. H. Dewey* with him,) for the defendant.

G. F. Hoar & T. Kinnicutt, for the plaintiff. Replevin proceeds upon the ground that the defendant is a wrongdoer, and that the plaintiff has the present right to lawful restitution. 3 Bl. Com. 145. 5 Dane Ab. 516. Com. Dig. Pleader, 3 K. 1. *Meany* v. *Head*, 1 Mason, 319. Property replevied is taken into the custody of the law in the first instance, and then delivered into the custody of the plaintiff upon his giving adequate security for its return if he shall not maintain his right. The consideration that the article may be of peculiar value to the defendant has no stronger application to a jewel than to a picture. If this defence can be maintained, a man may take property by any means not amounting to theft, and defy the

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owner. Replevin was originally instituted to test the legality of distraints, and its principles and rules are to be found in the law of distress. Can it be claimed that chattels distrained might be rendered irrepleviable by being carried upon the person? 3 Bl. Com. 145. Com. Dig. Action, M. 6. Co. Lit. 145 *b*. There is no instance, in which a party has a right to the instant delivery to him, by lawful process, of property, personal or real, in which any such protection as is claimed by the defendant is recognized by law. Bac. Ab. Ejectment, G. 2; Trespass, F. 2. *United States* v. *Lowry*, 2 Wash. C. C. 169. A writ of *habere facias possessionem* may be executed by breaking doors. *Howe* v. *Butterfield*, 4 Cush. 302. A house may also be broken for the service of a replevin writ. *Semayne's case*, 5 Co. 91. Bac. Ab. Replevin, E. 7. 3 Bl. Com. 149. Gilbert on Distresses, 78. And the house is more sacred than the person. The right to retain wearing apparel on the ground of decency is like the protection from molestation of a man who is sick or dying. The cases relating to attachment on mesne process or execution of property of the defendant are not applicable to the taking by replevin of the specific property of the plaintiff. The remedy in equity is of recent statute origin, and is bounded by the common law remedy, for it extends only to goods secreted or detained so that they cannot be replevied. Rev. Sts. *c.* 81, § 8. Gen. Sts. *c.* 113, § 2.

Bigelow, C. J. Replevin at common law is founded on the wrongful taking of personal property; and is a remedy, by which the person, from whom goods or chattels are taken, may be restored to the possession of them until the question of title can be judicially tried and determined. It has been said that in England this action is confined to cases of taking property by distress. In a certain sense, this may be true. In practice, it would seem that the remedy by replevin is seldom, if ever, resorted to there, except for the purpose of trying the question whether goods are rightfully distrained; and in such cases the method of prosecuting the suit is not by writ at common law, but by the more simple and speedy mode of a complaint to the sheriff under *St.* 52 H. 3, *c.* 21, commonly called the Statute

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of Marlebridge. But notwithstanding the disuse of the writ of replevin at common law in the English courts, it is still recognized in works of authority as being an appropriate and legitimate method by an owner of goods or chattels, alleged to have been unlawfully taken, to obtain possession of them until the question of title can be determined. 3 Bl. Com. 147. Com. Dig. Replevin, A; Pleader, 3 K. 1. *Shannon* v. *Shannon*, 1 Sch. & Lef. 327, & note. Selw. N. P. 1185. Wilkinson on Repl. 2. See also *George* v. *Chambers*, 11 M. & W. 149; *Mennie* v. *Blake*, 6 El. & Bl. 842. So the law has been understood in this commonwealth. *Ilsley* v. *Stubbs*, 5 Mass. 280. *Badger* v. *Phinney*, 15 Mass. 362. *Baker* v. *Fales*, 16 Mass. 147. And our statute, Gen. Sts. *c.* 143, § 10, which gives to the owner of goods unlawfully taken the right to sue out and prosecute a writ of replevin, would seem in this respect to be only declaratory and in affirmance of the common law, and to confer no new remedy or additional right for the recovery of property tortiously taken from the owner. In our practice it is often resorted to, instead of an action of trespass or trover, as a simple and convenient method of trying the title to goods and chattels. It is a purely personal action, which any party may commence, as of right, by suing out a writ, without preliminary oath or other formality, in like manner as other civil suits are brought. Its peculiar and distinguishing characteristic is, that it takes the property in controversy from him who by his possession of it is *prima facie* its owner, and places it in the hands of the plaintiff, substituting in its stead a personal security in the form of a bond to the defendant for its return if such shall be the final judgment of court.

But although replevin is at common law a general remedy to recover property wrongfully taken, it does not follow that it is of universal application, so that it can be effectually used in all cases, whatever may be the condition or situation of the property. Remedies are always to be used and applied in subordination to the great principles of right, which it is the object of the law primarily to secure and protect. Redress is not to be obtained by doing a wrong. A person cannot use the process of

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law in vindication of his own rights in such way as to invade those of another. To illustrate: A creditor can in certain cases arrest the body of his debtor; this is a clear legal right; but it cannot be exercised by a forcible entry of the debtor's dwelling, because such an act would infringe on another right equally clear, by which a man's house is made a place of shelter and repose, which no one armed only with civil process can break into or disturb. So a criminal is liable to arrest and to have his person and premises searched; the good order and safety of the community require that this right should be enforced; but it cannot be done without warrant under oath, specially designating the person and object of search and arrest, because that would be contrary to the right of every person to be secure against unreasonable searches and seizures. The truth is, that in determining whether a particular remedy is applicable or appropriate in any case, it is not sufficient to consider whether it will be effectual to redress the grievance or vindicate the right of one party. An equally essential and necessary inquiry is to ascertain whether it can be employed without an infringement of the rights and privileges of the other party. If it cannot be, then it follows that the law will not sanction it. There are cases, no doubt, in which legal process, lawfully used, may cause inconvenience and hardship, and even operate oppressively on those against whom it is directed; but we know of no case in which it can be legitimately made the instrument of wrong, or the means by which private rights can be invaded or taken away.

It seems to us, on careful consideration, that this action cannot be maintained without coming in conflict with this plain and elementary principle. The proposition on which the plaintiff must rest his case amounts, when examined, to this; that on a process in its nature purely civil an officer is bound to seize and search the person of the defendant. The statement of such a proposition carries with it a sufficient refutation. Its practical recognition would lead to a palpable infraction of the cardinal principle by which, under our constitution and laws, the sanctity of the person is guarded from unfounded and ground-

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less searches and arrests. There is nothing in the nature of a writ of replevin, which gives to it any efficiency or power over the person, superior to other civil process. It may be sued out at the will of any person who sees fit to assert a title to property in the possession of another; no oath or other sanction is required to prevent its misuse or abuse; even the right of property, which it seeks to establish, may on investigation prove to be wholly without foundation. How then can it be contended that it confers on an officer an authority, which cannot be exercised even under a criminal process, except when it is verified by oath and issued with the formalities required by the constitution and laws?

Certainly no precedent or authority has been cited, and none, we believe, can be found, that sustains the doctrine which the plaintiff must establish in order to maintain this action. In England, as we have already said, the process of replevin is used only in cases where property has been distrained, for the purpose of trying the legality of the seizure, and is confined chiefly, if not entirely, to beasts of the field and of the plough, implements of husbandry, household goods, and other chattels, not found or used on the person; and in Ireland, where the writ of replevin at common law is still a common remedy to try the title of goods and chattels in any way wrongfully taken, no case is found in which it has been used for the purpose of taking articles of clothing, or of personal use or adornment, from the person of the defendant. In a matter of this sort, relating, as it does, to the extent of the power conferred on an officer in the service of a process known to the common law from the earliest period, we regard the entire absence of authority in support of the right claimed by the plaintiff to be a strong argument against its existenee.

It was urged by the counsel for the plaintiff, as giving color to his argument that a writ of replevin had a peculiar force and that in serving it extraordinary authority might be exercised by the sheriff, that at common law the outer door of a dwelling-house might be forced in order to replevy the property described in the writ. The chief authority cited in support of this posi-

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tion is *Semayne's case*, as reported in 5 Co. 91. But on examination it will be found not to sustain it. The fifth resolution in that case only affirms the familiar principle, which is applicable to the service of all civil process, that a dwelling-house does not protect the person of a stranger who, on pursuit, flies thither and takes refuge; nor the property of a person, not the owner or tenant of the house, which is brought there to prevent execution and to escape the ordinary process of law, or, as it is said, which is placed there "by fraud and covin." So a writ of replevin might be served in like manner by a forcible entry of a house when a distrainor "conveys the goods of another, which he has distrained, to his house or castle, to prevent the owner to have replevin;" that is, when a person fraudulently and covinously uses his house to take the property of a third person out of the reach of the process of the law. And this principle of the common law was affirmed by *St.* Westm. 1, *c.* 17, which was passed to prevent the mischief arising from the practice of driving distress into strongholds by the barons, so that "the poorer sort suffered so much from the men in power." Gilbert on Distresses, 78, 79. 2 Inst. 193, 194. 5 Co. (ed. 1826) 93 *a*, note. It is not therefore correct to say that an officer may in any case enter a dwelling-house by force to make service of a writ of replevin. If such right can be exercised at all, except when goods distrained are taken by the distrainor into his house with the design to place them beyond the reach of the owner, (which may well be doubted,) it cannot be extended to cases where there is no evidence of fraud or of an attempt to conceal the property of another person in a house for the purpose of avoiding service of the writ. In this respect, the authority of an officer in the service of a writ of replevin would seem to be substantially the same as that which can be lawfully exercised in executing other civil process. Certainly there is nothing in any view which can be taken of the language used in *Semayne's case* and in other books of authority, which either directly or by analogy sustains the right of an officer to replevy from the body of the defendant articles carried or worn about the person.

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The exercise of such a power is not only contrary to right and unsupported by authority, but it is also inconsistent with sound policy. Practical jurisprudence looks, in the application of remedies, to the peace, good order and decorum of society. The evils which would flow from the unrestricted use of a civil process to search the person and to seize from it articles of dress or use or ornament are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person. If the right exists at all, it cannot be limited to particular articles of use or adornment, but must extend to every article of apparel worn by persons of either sex, and might be lawfully exercised at the sacrifice of decency and the proprieties of life. The reasons on which the restraint upon the power of taking articles from the person by distress or by attachment and execution is founded apply with equal force to the right to take them by replevin. *Sunbolf* v. *Alford*, 3 M. & W. 248. *Mack* v. *Parks*, 8 Gray, 517.

Nor is there any necessity for giving such a remedy to recover property of this nature. A bill in equity under Rev. Sts. *c.* 81, § 8, (Gen. Sts. *c.* 113, § 2,) to compel the redelivery of goods or chattels taken or detained from the owner and withheld so that the same cannot be replevied, would afford ample redress in all cases where the property is so situated that it cannot be taken without an interference with the person.

Exceptions sustained.

At a second trial in the superior court, the plaintiff conceded that, when the defendant was asked to serve the replevin writ, the pin was affixed to the bosom of Spring's shirt, in the manner in which breastpins are usually worn; but offered to prove that Spring had placed it there, not as an article of wearing apparel or personal ornament, but for the sole purpose of keep-

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ing it out of the reach of legal process, knowing that he had no valid title to it; and that the defendant might have seized it. But *Morton*, J. excluded the evidence, and ruled that, under the circumstances conceded and offered to be proved, the defendant was excused from serving the writ of replevin. The plaintiff submitted to a verdict for the defendant, and alleged exceptions, which were argued at October term 1861.

Hoar, for the plaintiff. The plaintiff refers to the authorities and suggestions at the first argument. The question now presented is whether any article small enough to be kept by a defendant on his person is irrepleviable. Can a landlord distrain his tenant's watch for rent, and by keeping it on his person prevent the legality of the distress from being tested? If a child, too young to be punished for larceny, seizes in a jeweller's shop a valuable diamond, is there no legal process by which the possession can be restored to the proper owner?

Dewey & Williams, for the defendant.

Bigelow, C. J. The facts now offered to be proved in support of this action do not change the result at which we arrived in considering the case as presented at the former hearing. It was then determined that replevin did not lie at common law for articles of dress or personal adornment, alleged to have been unlawfully taken, and which were actually worn on the person at the time when the service of the writ of replevin was attempted. The necessity of securing immunity to the person from unreasonable searches and seizures, and the impolicy of allowing an unlimited power to an officer to take on civil process articles worn on the person, forbid the extension of the remedy by replevin to property so used and situated. A bill in equity for property unlawfully withheld affords an ample remedy to recover possession of property of such a nature.

Exceptions overruled.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK, ESSEX, MIDDLESEX, NORFOLK, PLYMOUTH, BRISTOL, BARNSTABLE, DUKES COUNTY AND NANTUCKET, AT THE ADJOURNED SESSION IN OCTOBER OF JANUARY TERM 1860 AT BOSTON.

PRESENT:

HON. GEORGE T. BIGELOW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. PLINY MERRICK,
HON. REUBEN A. CHAPMAN, } JUSTICES.

COMMONWEALTH *vs.* ANDREW C. WALLACE & another.

An indictment for a conspiracy must set out the unlawful agreement in such detail as to show a conspiracy to effect the purpose by illegal means, and to inform the defendants of the acts intended to be relied on, and enable the court to judge of their character; and does not do this sufficiently by alleging that the defendants, maliciously contriving, devising and intending to cheat and defraud a person named, and to obtain from him a specified sum of money by means of false pretences, unlawfully conspired to obtain that sum from him, and then setting forth the acts done in the execution of the agreement.

INDICTMENT for a conspiracy, alleging that the defendants on the 21st of August 1858, with force and arms, at Melrose, in the county of Middlesex, "being persons of an evil disposition, and maliciously contriving, devising and intending one

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Joseph E. Westgate to cheat and defraud, and then and there maliciously contriving, devising and intending to obtain from the said Westgate a large sum of money, to wit, the sum of three hundred dollars, of the moneys of the said Westgate, by means of false pretences, did then and there unlawfully combine, conspire, confederate and agree together, knowingly, designedly and by false pretences and representations to the said Westgate, to obtain from the said Westgate the sum of three hundred dollars of the moneys of the said Westgate; and in pursuance of said unlawful combination and conspiracy," the indictment proceeded to aver, the defendants then and there made to Westgate certain false and fraudulent representations, which were fully set forth.

The defendants, being convicted in the superior court, moved in arrest of judgment, because no offence was duly set forth in the indictment. *Morton*, J. overruled the motion, and the defendants alleged exceptions.

A. V. Lynde, for the defendants.

S. H. Phillips, (Attorney General,) for the Commonwealth, cited *The King* v. *Gill*, 2 B. & Ald. 204; *Sydserff* v. *The Queen*, 11 Ad. & El. N. R. 245; *Regina* v. *Whitehouse*, 6 Cox C. C. 38; *Regina* v. *Carlisle*, 6 Cox C. C. 366; Note to *Commonwealth* v. *Eastman*, in 1 Lead. Crim. Cas. 294; Whart. Crim. Law, §§ 2299–2306 & notes.

Dewey, J. The motion in arrest of judgment in the present case must prevail. In the conflict of authority as to the proper mode of charging a conspiracy, and the facts necessary to be alleged in the indictment, we are to follow the line of precedents established by this court. This subject was very fully considered in the cases of *Commonwealth* v. *Hunt*, 4 Met. 111, *Commonwealth* v. *Eastman*, 1 Cush. 225, and *Commonwealth* v. *Shedd*, 7 Cush. 514. One leading principle is that the unlawful agreement constitutes the gist of the offence. Any averment of the acts done in execution of such conspiracy does not aid the indictment, and the proof of them is not necessary to a conviction. The indictment must therefore set out an offence complete in itself, without the aid of the averment of illegal acts done in

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pursuance of the conspiracy. The charge of "cheating and defrauding" does not necessarily import the commission of any indictable offence, either at common law or by statute. Therefore, when the object of the conspiracy is "to cheat and defraud," the means proposed to be used must be set out, and set forth in such detail as to show a conspiracy to effect the intended purpose by illegal means — thus enabling the court to see the character of the acts proposed to be done in the accomplishment of the purpose of the intended conspiracy, and also apprising the defendant of the facts relied upon to constitute the offence with which he is charged.

The present case, it is true, differs from the cases of *Commonwealth* v. *Eastman* and *Commonwealth* v. *Shedd* in some respects. It contains an allegation of a conspiracy to cheat and defraud, and to obtain a sum of money from the moneys of Joseph E. Westgate "by means of false pretences," and alleges that the defendants unlawfully conspired "by false pretences and representations to the said Westgate" to obtain from the said Westgate the sum of three hundred dollars, &c. The further inquiry is whether this form of indictment does sufficiently set out the unlawful means proposed to be used. In an indictment for cheating by false pretences, such a general allegation would be clearly insufficient. As it is here introduced as the only legal foundation for the indictment, and the validity of the indictment depends entirely upon the conspiracy to use illegal means to cheat and defraud, the court are of opinion that those means should be set forth with more particularity than by the general allegation "of false pretences." An appropriate form is found in 2 Archb. Crim. Pl. (Waterman's ed.) 1049, in this form: "Did unlawfully conspire, combine and agree together falsely and fraudulently to cheat and defraud the said C. D. of a large sum of money, viz. the sum of £ ——, under the false and fraudulent pretence that," &c. (stating the false pretence).

In *State* v. *Roberts*, 34 Maine, 320, an indictment like that in the present case was held bad, as not sufficiently descriptive of the means to be used. The description of the means was

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said to be too general, and as the validity of the indictment in that case depended upon the illegal means to be used, the indictment could not be maintained. The same is the case here, and we think, for the like reasons, this indictment is insufficient.

We are aware that under the English decisions in *The King* v. *Gill*, 2 B. & Ald. 204, and other subsequent cases recognizing the authority of that case, this indictment might be sustained. But we are also aware that while thus sustaining the case of *Rex* v. *Gill* as an authority to be followed by them, one learned judge has declared that it "is generally mentioned as a case of the greatest laxity;" *The Queen* v. *Parker*, 3 Ad. & El. N. R. 299; and another has expressed his regret "that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid." *The Queen* v. *Kenrick*, 5 Ad. & El. N. R. 61. We shall avoid these objections, and also give effect to the principles upon which our previous decisions were founded, by holding the form of the present indictment insufficient.

Judgment arrested.

COMMONWEALTH *vs.* FRANKLIN M. MORRISON.

Upon an indictment under the *St.* of 1845, c. 27, for maliciously, and with intent to procure an abortion, causing a woman to take any medicine, it is not necessary to allege or prove the name of the medicine, or that it was noxious.

CHAPMAN, J. The language of the *St.* of 1845, *c.* 27, is very plain. Excluding those expressions which have no application to this case, it is as follows: "Whoever maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall advise her to take or swallow any poison, drug, medicine or noxious thing, if the woman shall not die in consequence thereof, shall be punished by imprisonment." This is the offence set forth in the second count of the indictment, on which count the defendant was found guilty.

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It having appeared in evidence that the defendant procured for the woman described two phials of liquids and a box of pills, and advised her to take them for the purpose alleged, she being pregnant by him, his counsel requested the court to instruct the jury that the government must prove affirmatively that the liquids and pills were noxious things. We think the court rightly refused to give this instruction, because the statute does not require the existence of such a fact to constitute the offence. The only overt act that is required by its terms to be proved, in connection with the criminal intent, is the advice to her to take the medicine. It is not required that the government shall prove what the medicine was, or whether it was such as would tend to produce the effect intended, or whether it was actually taken by the woman. Nor was it necessary to produce evidence to prove that the grand jury did not know the name of the medicine; and the instruction given to the jury was right on that point.

It was urged in argument that by this construction of the statute a person may be punished for advising a woman to swallow an article as harmless as bread or water. This is indeed true; but if the party knows their quality, and that they have no tendency to produce the miscarriage, then the criminal intent cannot exist. He must believe they have some tendency to produce the desired result, otherwise it is impossible that his advice to the woman to take them should be with intent thus to produce it. If he has such a belief, it may well be that the legislature has thought fit to punish him for thus tampering with a woman's health and life, though he may be utterly mistaken as to the character and effect of the medicines. And if it were necessary for the government to prove the quality of the medicines, it might often be difficult to convict offenders who had used the most noxious drugs.

At any rate, the language of the act, from which we must ascertain what was intended, seems to us to bear no other construction than the one which we have given it.

Judgment on the verdict.

G. A. Somerby, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

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COMMONWEALTH *vs.* JOHN McCUE.

On the trial of a complaint against the owner of cattle for an assault and battery in taking them from a person driving them along the highway, who had found them going at large there without a keeper, the testimony of that person that he was a field-driver of the town, and as such was taking them to the town pound, and had acted as such for many years, is competent and sufficient to prove that he was a field-driver; and his subsequent demand of illegal fees is immaterial.

COMPLAINT for an assault and battery upon John Higgins. Trial in the superior court in Middlesex before *Morton*, J., who signed this bill of exceptions:

"There was evidence tending to show that Higgins on the day of the alleged assault was driving the defendant's three cows which Higgins had found in the street going at large in the town of Somerville without a keeper, and that said assault was made by the defendant in his attempt to retake said cows.

"Higgins testified that on the day of said assault he was one of the field-drivers of said town, and as such field-driver was taking said cattle to the town pound, and that he had acted as such field-driver for a number of years. There was no other evidence offered to prove that Higgins was such field-driver.

"The defendant objected that the fact that Higgins was field-driver could not legally be proved by his testimony, but must be proved either by the certificate of his appointment, or by his acts in that capacity, other than the single act on the day of the assault. But the court admitted the evidence.

"The defendant requested the court to instruct the jury that the testimony of Higgins that he was field-driver, and his acts as such on the day of the assault, were not sufficient to prove him such; and that there being no other evidence that he was field-driver, the defendant could not be convicted of the assault complained of, if it was committed by him in his attempt to retake said cattle, and he used no more force than was actually necessary to retake them.

"The court refused so to instruct the jury to the full extent

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asked; but did instruct them that if Higgins was not a field-driver, as claimed, then he had no right to take said cattle, and if the defendant made said assault in his attempt to retake them, and used no more force than was actually necessary to meet and repel the force by which they were detained, he could not be convicted of said charge; that it was not necessary that the appointment of Higgins as such officer should be proved by any instrument in writing; that there was evidence in the case for the jury to consider on the question; and if it satisfied them that he was such field-driver, then he had a right to take said cattle if they were going at large without a keeper, and the defendant had no right to retake them, and any assault in such attempt could not be justified.

"There was some evidence tending to show that Higgins, after taking said cows, while they were in his possession and before the assault, offered to give up the cattle if the defendant would pay the sum of one dollar and eighty cents, which was more than the fees allowed by law to a field-driver. The defendant contended, and asked the court to instruct the jury, that if they were satisfied that Higgins did so demand more than his legal fees before releasing said cattle, then he was a trespasser *ab initio*, and the defendant had a right to take such cattle, using no more force than was necessary. But the court refused so to instruct; and instructed the jury that it made no difference in said cause what fees the field-driver demanded, or offered to take. And the defendant, feeling himself aggrieved by all the foregoing rulings and instructions and refusals to rule and instruct, alleged exceptions."

E. Ripley, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

CHAPMAN, J. The testimony of Higgins that he was a field-driver and had acted as such implies that he acted under the belief that he had been legally elected and qualified; and it was submitted to the jury with proper instructions. It was sufficient *prima facie* evidence that he was an officer *de facto*. 1 Phil. Ev. (4th Amer. ed.) 592 & notes. 1 Greenl. Ev. §§ 83, 92, & notes.

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The jury were also instructed correctly that it made no difference in the case that Higgins demanded or offered to take illegal fees. The evidence offered on that point did not tend to establish any justification for an assault and battery.

Exceptions overruled.

COMMONWEALTH *vs.* INHABITANTS OF TAUNTON.

An indictment against a town for suffering a highway to be out of repair is supported by proof that the way is inconvenient, without proof that it is absolutely unsafe.

On the trial of an indictment against a town for suffering a highway to be out of repair, the jury were instructed, that if, taking into consideration the location of the way and the extent and kind of travel over it, they were satisfied that there was a substantial inconvenience in the use of the road, burdensome to the traveller as compared with other similar ordinary roads, they might find that the way was inconvenient, but proof of slight inconveniences would not be sufficient. *Held*, that the defendant had no ground of exception.

A way cannot be proved to have become a public highway by dedication or prescription, so as to render a town liable for its repair, without proof that it had become such before the passage of *St.* 1846, *c.* 203.

INDICTMENT for suffering a highway to be out of repair "so as to be inconvenient and dangerous to the lives and safety of the citizens of the Commonwealth then and there passing," &c.

At the trial in the superior court in Bristol before *Vose*, J., the Commonwealth introduced evidence tending to show that during the time covered in the indictment the way, by want of proper grading, surface covering and drainage, was very muddy and miry and inconvenient for travellers. And for the purpose of charging the defendants with the liability of keeping it in repair, evidence was introduced that the way was within the limits of the town; that it had been used as a public way for more than thirty years, and was used as such during the time named in the indictment, and since; that it was known in the town by the name of Dean Street, most of the witnesses testifying that they lived on the street, and one of them that he had resided there for more than twenty seven years; and that the road was used for teams between Taunton and neighboring towns.

The defendants offered no evidence; and requested the judge

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to instruct the jury "that the Commonwealth must show, not only that the road was inconvenient, but also that it was so unsafe that travellers using ordinary care could not pursue their ordinary business upon the road with reasonable facility, taking into consideration the season of the year and the nature of the soil over which the road was built; and that the evidence offered by the government was insufficient to show that the town was liable to keep the road in repair."

The judge declined to give the instructions prayed for; and instructed the jury "that the evidence would warrant them in presuming, in the absence of all other evidence, that this road had been opened for public use, and had been adopted and accepted by the town as a public highway; that, as to the condition of the road, the Commonwealth must satisfy them that the road was unsafe or inconvenient for those travelling upon it and using ordinary care; that, in determining whether it was either unsafe or inconvenient, the jury would take into consideration its location, and the extent and kind of travel usually passing over it; that whether a road was safe or inconvenient depended very much upon the facts and circumstances of each case, and proof of slight inconveniences would not be sufficient; and that the jury must be satisfied, having reference to the nature and amount of the public travel upon the road, that there was a substantial inconvenience in the use of the road, burdensome to the traveller, as compared with other similar ordinary roads, and growing out of causes which could be removed by the town by a reasonable expenditure of money." The jury returned a verdict of guilty, and the defendants alleged exceptions.

C. I. Reed, for the defendants.

S. H. Phillips, (Attorney General,) for the Commonwealth, cited *Commonwealth* v. *Charlestown*, 1 Pick. 188; *Commonwealth* v. *Low*, 3 Pick. 408; *Commonwealth* v. *Belding*, 13 Met. 10.

Bigelow, C. J. Towns are required by statute to keep all highways and town ways within their respective limits in repair, "so that the same may be safe and convenient for travellers." Rev. Sts. *c.* 25, § 1. It was not sufficient therefore for the de-

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fendants to show in the present case that the way was safe, so that a person might travel over it without danger to life or limb. A further duty was imposed upon them. The road was to be kept in such condition that it might be used with ease and convenience. Proof that it was inconvenient, so as to be burdensome to the traveller, supported the indictment, because it showed that the defendants had been guilty of a breach of a legal duty imposed by statute. *Commonwealth* v. *Springfield*, 7 Mass. 9. *Mower* v. *Leicester*, 9 Mass. 247. In considering the degree of negligence which would render the defendants liable, it was proper for the jury to take into view the state of other roads, similar in their construction, situation and use to that which was the subject of indictment. Negligence is a relative term. The jury must have some means by which to judge whether the defendants had violated their duty; and it certainly was not establishing too high a standard, or holding them to a too strict rule, to require that they should use the same diligence as was exercised by others charged with like duties and obligations as were imposed upon them. So far we are of opinion that the instructions were correct.

But they seem to us to be erroneous and deficient in that portion of the charge which related to the legal liability of the town to support and repair the road set out in the indictment. There having been no proof that the way had ever been laid out in the manner prescribed by statute, it could have become a public way chargeable on the town only by prescription or dedication. To establish a way by prescription it was necessary to prove an actual public use, general, uninterrupted and continued for at least twenty years. *Jennings* v. *Tisbury*, 5 Gray, 73. To render it a public way by dedication only, it was essential to show some act or prove some circumstances from which an assent to and acquiescence in such dedication by the town might be properly inferred. *Bowers* v. *Suffolk Manuf. Co.* 4 Cush. 332. But in either case it was necessary to show that it had become a public way prior to *St.* 1846, *c.* 203, which provides that "no way heretofore opened and dedicated to the public use and not already become a public way,

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and no way hereafter opened and dedicated to the public use, shall become chargeable upon any city or town, unless such way shall be laid out and established by such city or town in the manner prescribed by the statutes of this commonwealth." This provision seems to have been overlooked at the trial of this case. Under it the road in question could not have become chargeable on the defendants, unless it had become a public way either by prescription or dedication prior to its enactment. The attention of the jury was not called to a consideration of the facts in evidence in the light of this provision, and it is impossible to support their verdict, because it cannot now be known that it may not have been founded, either in whole or in part, on the proof of the use of the road as a public way since the statute above cited was passed. *Exceptions sustained.*

Commonwealth *vs.* Rumford Chemical Works.

The statutes of the Commonwealth have not superseded the remedy by indictment at common law for a nuisance in carrying on an unlawful and offensive trade and manufacture.

An indictment for a nuisance at common law sufficiently describes the nuisance, and is not bad for duplicity, which alleges that the defendants at a certain day and place set up and maintained certain buildings, and on that day and on divers others between that day and the day of the finding of the indictment used and employed therein large quantities of acid, guano, tar, oil, bone and dead bodies and other noxious and offensive substances in the manufacture of acids, colors, chemicals and chemical products, by means whereof divers noxious and offensive smokes, gases, smells and stenches were emitted, so that the air was filled and impregnated therewith, and rendered corrupt and unwholesome, to the great damage and common nuisance of all persons then and there being.

Merrick, J. This is an indictment against the defendants for a nuisance in maintaining and carrying on an offensive trade and manufacture at Seekonk in the county of Bristol. Such acts constitute a misdemeanor prohibited and punishable by the common law. Bac. Ab. Nuisance, A. *Rex* v. *Neil*, 2 Car. & P. 485. 1 Russell on Crimes, (7th Amer. ed.) 318. After a plea of *nolo contendere*, the defendants moved in arrest of judgment,

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upon the ground that the indictment did not set forth any offence now prohibited by law, or for which any party can be prosecuted by indictment, or punished upon conviction under it. Their motion is predicated upon the position that the whole common law upon this subject has been impliedly, but effectually, repealed by the statutes of the Commonwealth.

In the case of *Commonwealth* v. *Cooley*, 10 Pick. 37, it was held that a statute is impliedly repealed by a subsequent one revising the whole subject matter of the first; and that the implication is at least equally strong in relation to a revision of the common law. But it is never to be presumed that the legislature intended to make any innovations upon the common law further than is absolutely required upon a just interpretation of the provision sof its positive enactments. And this, it is said by Chancellor Kent, has been the language of the courts in every age. 1 Kent Com. (6th ed.) 464. In the decisions of our own, it has often been recognized as an established rule that a statute is not to be construed as a repeal of the common law unless the intent to alter it is clearly expressed. *Commonwealth* v. *Knapp*, 9 Pick. 514. *Melody* v. *Reab*, 4 Mass. 473. It is a direct and necessary consequence from this principle, that a statute may be in affirmance of the common law, adding new regulations and supplying additional remedies, but leaving in full force those which might before have been resorted to for the redress of public or private grievances.

It is then to be considered whether the several statutes of the Commonwealth, in reference to the places where and the buildings in which offensive trades, manufactures or other employments may be established and carried on, were intended by the legislature to supersede and repeal the whole common law on the same subject. The first of these statutes was enacted soon after the adoption of the constitution. It appears to have been taken substantially from those which were in force under the provincial charter, and was limited to certain enumerated kinds of business. *St.* 1785, *c.* 1. Regulations were subsequently prescribed respecting the exercise of any trade or employment offensive to the inhabitants or dangerous to the pub-

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lic health. Rev. Sts. c. 21, §§ 47–49. And again in 1855 "an act in relation to offensive trades" was enacted. St. 1855, c. 391. The provisions of these several statutes were revised and re-enacted, with some alterations and amendments, in the General Statutes, which were in force when the defendants entered their plea, and filed their motion in arrest of judgment. Gen. Sts. c. 26, §§ 52 *& seq.*

In examining the provisions in the several statutes, we think it does not appear to have been the intention of the legislature to repeal the entire common law on the same subject. Authority is given to the board of health in the different towns and cities within the Commonwealth from time to time to assign certain places within their respective municipal limits for the exercising of any trade or employment which is a nuisance or hurtful to the inhabitants, and to prohibit their exercise in places not so assigned, or if they shall think proper, within any part of the town. Gen. Sts. c. 26, § 52. This general provision is followed by others prescribing the mode of proceeding and the remedy of parties alleging themselves to be injured, when the board have acted under the authority conferred. So far as these provisions extend, the rules and course of proceeding under the common law are superseded; but in all other respects it continues in force as before. If the board of health acts and assigns places in which any particular trade or employment may be carried on, such an assignment would undoubtedly legalize the occupation of any person conducting his business in that place; and he would then be liable to no process, suit or prosecution other than those which are specially appointed and prescribed. But if no such assignment has been made, and the board of health in the exercise of their discretion have not seen fit to act at all, a remedy for injuries to the public, or for the violation of private rights, by the permanent maintenance of offensive trades and employments, must be found in the rules and principles of the common law. The statute, by leaving that body to act according to the discretion of its members, has imposed no duty upon them which they are imperatively bound to perform; and no means have been provided by a recourse to which, as by a complaint

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made to them, they can be compelled to exercise the power with which they are entrusted. Yet cases may readily be supposed in which they might not think it expedient to act, but which in the judgment of others, or of a jury, would fully establish the fact of the existence and maintenance of a nuisance. The statute ought not to be construed so as to leave such cases beyond repression by the power of the law. And the omission to provide for all possible or probable cases clearly evinces that the legislature did not intend to revise the whole subject, and to supersede the entire common law in relation to this class of offences; but only to modify and repeal it in and for the particular instances, and in reference to the enumerated circumstances, which are specially provided for. In all other respects, it is apparent that no change or innovation was contemplated or intended to be introduced or established.

The indictment against the defendants being a proceeding under and according to the common law, it is not affected by the repeal by the General Statutes of any acts previously existing. Its allegations set forth with sufficient precision and accuracy the charge of establishing, maintaining and continuing an offensive trade. The averments that the defendants on a day named set up, erected and maintained certain buildings, and on said day and on divers days and times between that day and the day of the finding of the indictment did, in said buildings, unlawfully use and employ, decompose and combine, large quantities of acid, guano, tar, oil, bone and dead bodies, and other noxious and offensive substances, in the manufacture of acids, colors, chemicals and chemical products, by means whereof divers noxious, offensive and unwholesome smokes, gases, smells and stenches, were issued and emitted from said buildings, during all the time aforesaid, so that the air then and there was thereby filled and impregnated therewith, and rendered corrupt, offensive and unwholesome, to the great damage and common nuisance of all persons then and there being, set forth and describe the alleged nuisance in a full, substantial and formal manner.

The objection that it does not show what should be abated

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is immaterial, since that is not a necessary part of the judgment to be rendered upon conviction. The accused, if found guilty, may be sentenced to the payment of a fine; and when the indictment is against one or more persons the punishment may be also by imprisonment. 1 Russell on Crimes, 331.

Nor is the indictment against the defendants obnoxious to the objection of duplicity that is urged against it. It alleges a continuing offence, and in this respect it follows the language of approved and accurate precedents. 2 Chit. Crim. Law, 628 & *seq.* Archb. Crim. Pl. (10th ed.) 633.

Exceptions overruled.

B. Sanford & R. C. Pitman, for the defendants.

S. H. Phillips, (Attorney General,) for the Commonwealth.

COMMONWEALTH *vs.* MARGARET M. MCAVOY.

A description in a complaint of a building as the property of Nathan S. Hoard is not supported by evidence that it was hired of Nathan Hoard, and that the defendant spoke of it as belonging to Mr. Hoard.

COMPLAINT for maliciously breaking glass in a building, the property of Nathan S. Hoard.

At the trial in the superior court in Bristol, before *Vose*, J., the only evidence of the ownership of the building was the testimony of one witness, who occupied it, that she hired it "of Nathan Hoard;" and of another that the defendant, at the time of breaking the glass, said, "I will break every window in the house; I am able to pay for it, and you may tell Mr. Hoard." The defendant asked the court to instruct the jury that the government had not given sufficient proof that the building was the property of Nathan S. Hoard. But the court declined so to instruct the jury; and instructed them that if they were satisfied, beyond a reasonable doubt, that the person spoken of, and intended by the defendant at time of breaking, was Nathan Hoard, and that she referred to him as owner of the property, and were also satisfied that it was his property, and

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that the defendant did the acts set forth in the complaint, they would be authorized to find a verdict of guilty. The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Brown, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

By the Court. There was a fatal variance between the name of the owner of the building as stated in the complaint and as proved at the trial. The name of Nathan Hoard is not the same as Nathan S. Hoard. *Commonwealth* v. *Hall*, 3 Pick. 262. All the evidence concerning the ownership of the property is stated in the exceptions, and it is wholly insufficient to warrant the inference by the jury that it belonged to Nathan S. Hoard as charged in the complaint.

Exceptions sustained.

Commonwealth *vs.* Mary A. Frates.

A complaint charging the commission of an offence on a certain day, and from that day to the day of the date of receiving this complaint, and certified by a magistrate to have been received and sworn to on a certain later day, is a sufficient charge of the offence during the whole time.

Complaint for being a lewd, wanton and lascivious person on the 1st of August 1860, "and from that day to the day of the date of receiving this complaint." The complaint bore no date, except in the certificate of a justice of the peace, after the signature of the complainant, that it was "received and sworn to on the twenty-ninth day of August in the year of our Lord eighteen hundred and sixty."

At the trial in the superior court in Bristol, *Vose*, J. admitted evidence of lewd speeches and conduct on different days between the 1st and the 29th of August, and refused to confine the proof to the 1st of August or any other single day. The defendant was convicted, and alleged exceptions.

J. Brown, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

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By the Court. The time is alleged with sufficient certainty. The complainant knew when the complaint was received, because the act of making and signing it was his own act, and constituted a reception of the complaint within the meaning of the law. *Exceptions overruled.*

Commonwealth *vs.* Eustis K. Clapp.

A complaint containing two counts for different offences, the first of which distinctly describes the complainant, the defendant, and the place, and the second as "said complainant," "said J. S.," and the "town and county aforesaid," will support a verdict of guilty on the second count, although the defendant is acquitted on the first count.

Complaint by "Henry H. Dean of Easton, in the county of Bristol," charging "Eustis K. Clapp of Easton, in the county of Bristol," as a common seller of intoxicating liquor; with a second count for a single sale, beginning thus: "And said complainant on his oath aforesaid further complains that said Eustis K. Clapp, at Easton aforesaid, in the county aforesaid," &c. The defendant, being acquitted on the first count and convicted on the second in the superior court, moved in arrest of judgment, because the second count was not complete in itself, and, this motion being overruled, alleged exceptions.

C. I. Reed, for the defendant, cited *Regina* v. *Martin*, 9 Car. & P. 215; *Regina* v. *Waters*, Temple & Mew, 57, and 3 Cox C. C. 300; *Commonwealth* v. *Quin*, 5 Gray, 478.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Metcalf, J. In the most approved books of forms, ancient and modern, it is found, almost invariably, when an indictment contains more than one count, that all the counts, after the first, omit the description of the defendant which is contained and is necessary in the first, and describe him only as "the said A. B." These long established forms alone, if we found nothing further, would be proof that a repeated description of the defendant need not be given, and that, by an omission thereof, no risk of a failure of the prosecution is incurred, by a failure, for any

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reason, to sustain the first count, provided there is a verdict of guilty on either of the others; for pleadings are always evidence of the law; Buller, J., in *Read* v. *Brookman*, 3 T. R. 161; and books of entries are the best authorities in the absence of decided cases. Ashhurst, J., in *Boothman* v. *Surry*, 2 T. R. 10. There is, however, at least one adjudged case on this point. In *Phillips* v. *Fielding*, 2 H. Bl. 131, Gould, J. "remembered the case of an indictment for forgery, in which there were three counts for the forgery, and three for the utterance; in the first count the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised that the remaining counts described him, 'the said A. B.,' by reference to the first; but all the judges held that the description was good, and that the latter counts might refer to the former." In 2 Gabbett Crim. Law, 248, and in 1 Chit. Crim. Law, 250, it is stated that one count in an indictment may refer to a former count in describing the defendant as "the said A. B.," to avoid repetition of the description of him in the former; and that though the former count be defective, this will not vitiate the other which refers to it.

We cannot doubt that the law is the same when the jury acquit the defendant on a former count, and find him guilty on that in which he is described only by reference to the former.

The first charge in this complaint is made by Henry H. Dean of Easton, in the county of Bristol, against Eustis K. Clapp of the same Easton. The second charge (on which the defendant has been convicted by verdict) is by "said complainant" against "said Clapp;" that is, the same Dean and the same Clapp who are described in the first charge. And we perceive no reason why the complainant may not be described by reference to a previous description in the complaint, as well as the defendant.

Exceptions overruled.

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COMMONWEALTH *vs.* JAMES BENT.

On a trial on appeal from the judgment of a trial justice, a witness for the Commonwealth, who testifies on cross-examination that he cannot swear that he has not been threatened in relation to his testimony on this trial, and that the trial justice has intimated to him that all proceedings against him for a breach of his recognizance would be stayed if he would now testify against the defendant, may be asked by the district attorney on re-examination as to the particulars of a conversation between them, for the purpose of proving that the district attorney assured the witness before calling him that no prosecution should be urged against him for a default on his recognizance.

COMPLAINT for being a common seller of intoxicating liquors. At the trial in the superior court in Plymouth, on appeal from the judgment of the trial justice, a witness for the Commonwealth testified on cross-examination "that he could not swear that he had not been threatened in relation to his testimony on this trial, and also that the trial justice had intimated to him that all proceedings against him for not having appeared in compliance with his recognizance would be stayed if he would now testify against the defendant." The district attorney, on re-examination, was allowed by *Ames*, J., the defendant objecting, to inquire into the particulars of a conversation between himself and the witness for the purpose of showing that the witness had, before testifying, been assured that no prosecution should be urged against him for any default of his recognizance. The defendant, being convicted, alleged exceptions.

P. Simmons, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

BY THE COURT. The evidence objected to was clearly competent. It tended to rebut the inference of influence or bias operating on the mind of the witness in giving his testimony, which the cross-examination was calculated to lead the jury to draw. The district attorney was authorized to represent the Commonwealth in the matter of the recognizance given by the witness, and to determine whether process thereon should be issued. Rev. Sts. *c.* 13, § 38; *c.* 135, § 27. The evidence of his assurance to the witness that he would not be held for any default on his recognizance was admissible as showing that the supposed bias had been removed.

Exceptions overruled.

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COMMONWEALTH *vs.* JAMES GALLAGHER.

A complaint for larceny sufficiently describes the kind and value of property stolen as "copper coin of the value of two dollars and seventy five cents."

COMPLAINT for larceny of "copper coin of the value of two dollars and seventy five cents," of the goods and chattels of Elisha Brown and Charles Goodrich and in their possession. The defendant, after conviction in the superior court in Suffolk, moved in arrest of judgment. *Rockwell*, J. overruled the motion, and he alleged exceptions.

W. H. McCartney, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J. In *Commonwealth* v. *Sawtelle*, 11 Cush. 142, and in *Commonwealth* v. *Duffy*, 11 Cush. 145, it was decided that an indictment for larceny of sundry pieces of gold coin current in this commonwealth, or sundry bank bills current as money in this commonwealth, amounting in the whole to a certain sum mentioned, was sufficient, when the indictment stated that the grand jurors had not the means of describing the coins or bank bills more particularly. But it was said by the court, in the first of those cases, (as it had been previously said in *Larned* v. *Commonwealth*, 12 Met. 246,) that it had long been the settled practice in Massachusetts to charge a larceny of silver coins in the manner in which the larceny of gold coins was charged in that case, without stating, in the indictment, that the grand jurors could not more particularly describe them. And so it was subsequently decided, in *Commonwealth* v. *Stebbins*, 8 Gray, 492, as to an indictment for larceny of bank bills.

An indictment for larceny of coins usually alleges them to be money current in the Commonwealth. But we do not deem this to be necessary; for coins not here current as money are doubtless the subject of larceny. And in *United States* v. *Rigsby*, 2 Cranch C. C. 364, it was decided that an indictment for larceny of "one silver coin of the value of fifty cents" was sufficiently certain, and that it was not necessary to allege its value

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in the current money of the United States or of any other country.

It is objected to the complaint in the present case, that it does not appear therefrom whether one copper coin was stolen or more than one. But we are of opinion that "copper coin of the value of two dollars and seventy five cents" does not legally mean a copper coin, or one copper coin, but more than one, and as many as are necessary to constitute the alleged value. It is said, in Termes de la Ley, a work of high reputation, that "coin is a word collective, which contains in it all manner of the several stamps and portraitures of money." Williams and Tomlins, in their law dictionaries, say that the collective word "coin" contains in it "all manner of the several stamps and species of money in any kingdom." And we doubt not that this legal meaning of the single word "coin" is the same which is understood by people generally, as well as by professional men. It is the meaning given not only in law dictionaries, but by all lexicographers. As the word "coin," without any prefix, means metallic money generally, so "copper coin," without any further description, means copper money generally, and not a single coin, nor any specific number or kind of coins. In the present case, the words "copper coin" have the same meaning as copper coins. *Exceptions overruled.*

COMMONWEALTH *vs.* AARON A. BRADLEY.

An indictment may be presented and conviction had in the superior court since the General Statutes took effect for an assault and battery committed before.

INDICTMENT, found at August term 1860 of the superior court in Suffolk, alleging that the defendant at Boston on the 20th of May 1860 on Frederick J. Fatal "an assault did make with a flat iron and a slung shot, and him the said Fatal then and there did beat, bruise, wound and evil treat, and other injuries to him the said Fatal did then and there commit, to his great

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damage, and against the law, peace and dignity of said commonwealth."

The defendant, being found guilty, moved in arrest of judgment, for the following reasons: "1st. Because the indictment is defective in setting forth that an assault and battery was committed May 20th 1860, when in fact all our laws have been re-enacted and went into operation June 1st 1860. 2d. Because this indictment does not set forth what law of this commonwealth has been violated, and there is no existing general statute to punish any simple assault and battery. 3d. Because the judges of the superior court are creatures of the general statutes, and have no common law jurisdiction, except it is given by the general court of this commonwealth, and that limited to state practice." *Brigham*, J. overruled the motion, and the defendant appealed.

A. A. Bradley, pro se.

S. H. Phillips, (Attorney General,) for the Commonwealth.

By the Court. The indictment is sufficient, and sets forth an offence in apt and proper words, punishable by the law of this commonwealth in force at the time the indictment was found and tried; and of which the judges of the superior court, sitting in the county of Suffolk for the transaction of criminal business, had full jurisdiction. *Motion in arrest overruled.*

District Attorney for the Eastern District *vs.* Lynn and Boston Railroad Company.

The erection or continuance of a public nuisance may be restrained upon an information in equity by the attorney general or other law officer of the Commonwealth, either *ex officio* or upon the relation of a private person

The testimony of the superintendent and a director of an incorporated turnpike company and of one other person, to the effect that a horse railroad track about to be constructed under an agreement with the turnpike company, on the side of the turnpike road, leaving unobstructed the travelled road of such width as the turnpike company is required by its charter to maintain, will be an obstruction to the public travel and a public nuisance, is not sufficient to overcome the presumption that the turnpike company, being charged by law with maintaining their road in a fit condition for public travel, will not

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permit acts which will interfere with and obstruct it; nor warrant a court of equity in restraining by injunction the laying of the track.

The construction of a track for a horse railroad over a turnpike road, under an agreement with the turnpike company, by a corporation, whose charter contains a restriction making it "void so far as relates to the right to construct the said road in any town until the act has been accepted by the selectmen," will not be restrained by injunction as a nuisance in a town traversed by the turnpike road, merely because the selectmen of the town have not accepted the charter.

INFORMATION IN EQUITY by the district attorney for the eastern district, at the relation of the selectmen of the town of Saugus, to restrain the defendants from laying a track for a horse railroad within the limits of that town.

The information alleged that the defendants were incorporated by the *St.* of 1859, *c.* 202, with authority to construct, maintain and use a railroad from North Chelsea to Lynn, passing through Saugus, over the Salem and Boston Turnpike, and through and over such streets and highways as the mayor and aldermen and the selectmen of the respective cities and towns might designate; that by the fifteenth section of their charter it was declared that "this act shall be void, so far as relates to the right to construct the said road in either of said towns and cities, unless the same shall be accepted by the selectmen of such towns or the mayor and aldermen of such cities respectively;" that the selectmen of Saugus had never accepted that act; that the defendants were about to lay a track in Saugus on the Salem and Boston Turnpike, a public way established by law for the accommodation of the public; and that the digging up of the soil and other interruptions and obstructions to the public travel, necessary for laying the track, and the track, when constructed, would be a public nuisance.

The answer of the defendants, upon the oath of their president, admitted the truth of most of the statements in the information; but justified under proceedings and agreements with the Salem and Boston Turnpike Corporation, in accordance with the authority conferred upon the defendants by their charter; and denied that the laying and construction of their track would interfere with the public travel or be a public nuisance, or that the court had jurisdiction of the case in equity.

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At the hearing before *Hoar*, J., it appeared that the Salem and Boston Turnpike was a road constructed and maintained by a corporation established by *St.* 1801, *c.* 63, and had not been laid out as a public way; that the defendants' railroad track was to be constructed under an agreement between them and that corporation, by the side of and on a level with the turnpike road, not crossing it within the limits of Saugus, crossing no public highway, and leaving twenty four feet in width of the travelled part of the turnpike entirely unobstructed, and could be finished in a fortnight; and that the turnpike company was not required by its charter to maintain a roadway more than twenty four feet in width. The only evidence offered to show that the intended acts of the defendants would be a public nuisance was the testimony of the superintendent, a director of the turnpike company, and one other witness, that the turnpike road was used constantly by heavy teams, and that the laying of the defendant's track would make the road muddy, and would interfere with and obstruct the public travel over it. The case was reserved for the decision of the full court.

S. W. Bates, for the informant and relators, cited Gen. Sts. *c.* 14, § 18; *County Attorney* v. *May*, 5 Cush. 336; *Commonwealth* v. *Union Fire & Marine Ins. Co.* 5 Mass. 230; *Goddard* v. *Smithett*, 3 Gray, 125; *Dartmouth College* v. *Woodward*, 4 Wheat. 636; *Commonwealth* v. *Wilkinson*, 16 Pick. 175; *Murray* v. *County Commissioners*, 12 Met. 455; *Commonwealth* v *Nashua & Lowell Railroad*, 2 Gray, 54; *Grew* v. *Broadway Railroad*, 23 Law Reporter, 341; *Sts.* 1854, *c.* 435; 1857, *c.* 256.

P. W. Chandler & G. O. Shattuck, for the defendants, cited *Attorney General* v. *Sheffield Gas Consumers Co.* 3 DeGex, Macn. & Gord. 304; *Attorney General* v. *London*, 8 Beav. 286, 287; *Attorney General* v. *St. Aubyn*, Wightw. 167; *Ripon* v. *Hobart*, Coop. temp. Brougham, 333; *Graves* v. *Shattuck*, 35 N. H. 257; *Attorney General* v. *Utica Ins. Co.* 2 Johns. Ch. 371; *Georgetown* v. *Alexandria Canal*, 12 Pet. 98; *Cummings* v. *Barrett*, 10 Cush. 186; 2 Story Eq. Jur. § 924 *a*; *Commonwealth* v. *Essex Co.* 13 Gray, 239; *Williams* v. *Hingham & Quincy Bridge & Turnpike*, 4 Pick. 341; Gen. Sts. *c.* 62, § 12.

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BIGELOW, C. J. The authority of the attorney general, or other law officer empowered to represent the government, to file an information in equity to restrain and prevent a public nuisance seems to be well established in England. It may be done by him, either *ex officio*, or upon the relation of persons who have an interest in the subject matter of the bill and whose private rights may be protected by the decree which is sought mainly on the ground of a public injury. 1 Dan. Ch. Pract. 11. 3 Dan. Ch. Pract. 1858. 2 Story Eq. Jur. §§ 921, 926. *Kerrison* v. *Sparrow*, Coop. 305. *Attorney General* v. *Johnson*, 2 Wils. Ch. 87. *Attorney General* v. *Forbes*, 2 Myl. & Cr. 129, 133. Although in some of the earlier cases this jurisdiction was sparingly exercised, yet in recent practice it seems to have been more frequently resorted to as affording a convenient and speedy remedy. Nor are we able to see that any serious objection exists to this method of reaching and restraining a public nuisance. By it a nuisance which is threatened or in progress can be arrested, which cannot be done by proceedings at law; an injunction is more complete in its operation, because it prevents future acts as well as restrains present nuisances; and it affords a more prompt and immediate relief than could be obtained by other process. It is therefore a salutary power if exercised with discretion and confined within reasonable limits. Those limits are well defined. A court of equity will not interfere by injunction to restrain a public nuisance unless the existence of the nuisance is clearly established upon full and satisfactory evidence. If the proof is conflicting and the injury to the public uncertain or doubtful, the court will withhold its interposition. *Ripon* v. *Hobart*, Coop. temp. Brougham, 338, and 3 Myl. & K. 169. *Attorney General* v. *Sheffield Gas Consumers Co.* 3 DeGex, Macn. & Gord. 639. 2 Story Eq. Jur. § 924 *a*.

We have carefully considered the case made by the relators in support of the prayer for relief contained in the bill, and are clearly of opinion that there is no substantial ground for asking for the interposition of this court. It is not alleged that the defendants intend or threaten to construct their road in, upon

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or across any common highway or street in the town of Saugus, without the permission of the selectmen of that town as required by § 1 of the St. of 1859, c. 202, by which the defendants are incorporated. By the information, answer and proofs it appears that they propose only to construct their track over and upon the Salem and Boston Turnpike, a road constructed and maintained by a corporation duly authorized for that purpose, and charged by law with the care, safety and suitable repairs of said road, so that it may always be in a condition fit for public travel. It also appears that the defendants are acting in the construction of their track with the sanction and assent of the turnpike corporation, in accordance with a contract into which they have entered with that corporation in pursuance of a power expressly granted to them by § 3 of the act aforesaid. To the exercise of this power the consent or sanction of the selectmen of the town is not required. There is no ground therefore for the position that the acts of the defendants are in any respect unauthorized or illegal. Nor are we able to see anything in the evidence which tends to show that construction of the proposed railroad over said turnpike road will create any serious or continued hindrance or obstruction to public travel therein. In the absence of any evidence to the contrary, the reasonable presumption is that the officers of the turnpike corporation will perform their legal duty, and will not assent to or permit any act to be done by the defendants which will seriously interrupt or incommode persons having occasion to use the turnpike road which they are bound to keep in a safe and convenient condition for travel. There is certainly no evidence before us to overcome this presumption or to lead to the inference that any nuisance or public wrong will be committed by the defendants in exercising the rights and privileges conferred upon them by their charter. Upon the case therefore as now presented the order must be *Information dismissed, without prejudice.*

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Attorney General *vs.* City of Cambridge.

A statute authorizing county commissioners to lay out as a public highway a bridge originally established by the legislature over a navigable stream, and used as a public way for two hundred years, during which period the legislature has from time to time imposed upon various towns the expense of keeping the bridge in repair, and releasing from their obligation some of the towns upon which the duty and expense of maintaining it has been imposed by previous statutes, is constitutional; and leaves it the duty of the towns not released to maintain the bridge until the exercise by the county commissioners of the authority conferred upon them, even after their refusal, upon petition, to lay out the bridge as a public highway.

The St. of 1860, c. 95, releasing the towns of Lexington and West Cambridge from the obligation of contributing to the expense of maintaining the Great Bridge between Cambridge and Brighton, and of repairing and tending the draw, imposed upon them by earlier statutes, is constitutional; and imposes upon Cambridge and Brighton the whole duty and expense of maintaining, repairing and tending the bridge and draw, until the county commissioners lay out the bridge as a public highway.

The resolve of May 4th 1781, "that the towns of Cambridge and Lexington be at the whole expense of repairing said bridge, until the grants made said towns by the general court be wholly expended," did not release those towns from the obligation to repair the bridge after the expenditure of the fund granted.

Information in equity by the attorney general, at the relation of Emery Willard of Brighton, in behalf of himself and other inhabitants of the county of Middlesex, to restrain the city of Cambridge from raising and keeping raised the draw in the Great Bridge over Charles River between Brighton and Cambridge, and from closing and obstructing the avenues leading to the bridge, and removing the planking of the draw, to the public damage and nuisance of all the inhabitants of the Commonwealth, and particularly of the relator and other persons residing near the bridge.

An answer was filed, which was demurred to, and by which, in addition to the facts stated in the opinion, it appeared that the county commissioners of Middlesex, upon the petition of the city of Cambridge to lay out the bridge as a public highway, had adjudicated that the common convenience and necessity did not require that it should be so laid out.

Hoar, J. granted a temporary injunction, and reserved the case for the decision of the full court.

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J. P. Converse & W. W. Warren, for the informant and relators.

E. Washburn, for the respondents.

CHAPMAN, J. The respondents are right in their position that if they are not bound to support or repair the bridge, and if it was unsafe for travel, they ought to shut up the avenues to it, and prevent its use as a public highway. They contend that they are released from all obligation to support it by the *St.* of 1860, *c.* 95. That act contains two provisions. The first releases Lexington and West Cambridge from all obligation to contribute towards its support; and the second authorizes the county commissioners to lay it out as a highway. The respondents liken the first provision to the release of one of two joint obligors in a bond, the effect of which is to release the other also. This involves the idea that the obligation of Cambridge to maintain the bridge is founded in contract; and if this idea were correct, there might be some reason for saying that the release of two of the towns liable to contribute towards its maintenance released the other two. It must in such case be left to go to decay, for want of any provision for its support. It is obvious that if the legislature had intended this, a much more direct method would have been to discontinue it in terms. And if they intended to release all the four towns, they took great pains to make their intention obscure.

But we do not regard the obligation as having ever been founded in any contract, express or implied. On the contrary, we think it originated in the authority of the legislature to exercise its discretion in the distribution of public burdens. We think such authority has been exercised from time to time, ever since the erection of the bridge, in providing for its support; and that the act of 1860 is, in this respect, of a character similar to others which have preceded it.

The authority of the legislature to pass special laws of such a character has not been questioned in this case; it has been exercised in many instances, and is fully recognized and sustained in *Norwich* v. *County Commissioners*, 13 Pick. 60.

Cambridge originally included a large territory on both sides of Charles River, and has been the parent of several new

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towns which have been set off from it. The bridge was originally built within its limits, by authority of the colonial legislature, as stated in the answer, about the year 1660. The town seems to have had the control of the bridge and the responsibility of keeping it in repair; but various legislative grants were made to relieve the town of some portion of the burden.

In 1670 it was authorized to charge tolls upon travellers. In 1684 a grant of £ 10 per annum was made by the legislature towards the maintenance of the bridge. In 1699 Newton, which had been set off from Cambridge, was charged with one third of its support; and to encourage the rebuilding, which had become necessary, the legislature granted £ 153, and charged £ 50 each on Middlesex and Suffolk Counties. In 1700 the burden was again shifted, by dividing it equally between the town of Cambridge and the county of Middlesex. In 1704 the court of sessions ordered Cambridge to repair it. In 1712 Lexington was set off from Cambridge, with an obligation to pay its share for supporting the bridge, according to its valuation. In 1733 the legislature granted £ 300 for its support. In 1734 they granted three thousand acres of land to Newton, Cambridge and Lexington, for its support.

In 1781 Newton was released from further liability for its support. This release occasioned a suit in favor of Cambridge, which was decided in 1835. *Cambridge* v. *Lexington*, 17 Pick. 222. In that case, neither party contended that the release of Newton operated as a release of the other towns; but Lexington contended that no part of the increased burden should fall upon that town. Cambridge asserted the contrary and prevailed. That case substantially decides this.

It is contended that a resolve of the legislature, passed in 1781, and recently discovered, limited the obligation of Cambridge to support the bridge only while the avails of the three thousand acres of land should last. But we understand the resolve to amount to no more than a declaration that until that fund was expended no further legislative aid ought to be given.

In 1807 Cambridge was again subdivided, Brighton and West Cambridge being carved out of it; and they were re-

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quired to bear their proportion of the expense of maintaining the bridge. Both acts of incorporation treat it as a perpetual obligation; not as the result of a legislative contract, but as a legislative apportionment of their share of a public burden.

In 1838 authority was given to individuals to construct a draw; and all the four towns, Cambridge, Lexington, Brighton and West Cambridge, were charged with the new burden of keeping it in repair, and raised for the accommodation of vessels. Certainly no contract authorized such a proceeding.

In 1860 these towns appear to have been supporting the bridge in the following manner: Cambridge, the original municipality, took the control and responsibility of keeping the bridge in repair, its officers exercising their own judgment on the subject. The amount expended was annually ascertained, and each of the other three towns was called upon and paid its proportion.

Thus the bridge had been supported for many years; and so far as can now be ascertained, Cambridge has always had the sole control of the work. But by the process of subdivision, it had become situated between Cambridge and Brighton; and a glance at the map shows that Lexington and West Cambridge, as well as Newton, lay at a considerable distance from it. The act of 1860, which released them from all further obligation to support it, does not appear to have been unreasonable; and if we take the same view of it which this court and the town of Cambridge took of the act of 1781, releasing the town of Newton, the city of Cambridge should now keep the bridge in repair, and collect of Brighton its proportion of the increased expense.

But the bridge is now of a different character from most other bridges and highways in the Commonwealth. It exists by legislative enactment, and not by the laying out of a court of sessions or commissioners; and it is entirely under the control of Cambridge, while Brighton is obliged to contribute to its support. The second section of the act authorizes a change. If the county commissioners shall lay it out as a public highway, not only can they direct the manner of rebuilding it, and assess

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a portion of the expense, not exceeding one half, upon the county if they think proper, but the city of Cambridge and the town of Brighton will each take charge of the maintenance of that part which lies within its limits; and it will be hereafter maintained as most other bridges are.

This however seems to be left to the discretion of the county commissioners, with no more than a strong implication that it ought to be done by them. But until they exercise this authority, the bridge remains a public highway, as it has been almost from the first settlement of the Colony, and must be kept in repair by Cambridge, with a claim on Brighton for its proportion of the expense. *Injunction made perpetual.*

ELISHA W. SMITH *vs.* SAMUEL HIGGINS.

At a town meeting having under consideration an application from the assessors of the town for reimbursement for expenses incurred in defending a suit, on the ground that it was brought against them for acts done in their official capacity, which is opposed because that suit was brought against them for making false answers under oath to interrogatories propounded to them in another suit, a statement of a voter and taxpayer in the town that they had therein perjured themselves is privileged, if made in good faith, with a belief of the speaker in its truth, and without actual malice towards the assessors.

In an action of slander, the good faith and want of malice of the defendant, when material, may be proved by his own testimony.

ACTION OF TORT for slander, in saying of the plaintiff and two others, "They went to Barnstable and perjured themselves; I have it in black and white." Trial and verdict for the plaintiff in the court of common pleas in Barnstable at April term 1859, before *Bishop*, J., to whose rulings the defendant alleged exceptions, the substance of which is stated in the opinion.

W. L. Burt, for the defendant.

H. A. Scudder, for the plaintiff.

BIGELOW, C. J. It is not always easy to determine whether words tending to disparage private character were spoken under such circumstances as not to transcend the privilege afforded by the occasion on which they were uttered. On the one hand, it

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is important that the reputation of individuals should not be wantonly and unnecessarily assailed; and, on the other, freedom of speech should not be so restricted that a man cannot utter language essential to enable him to discharge properly either a public or private duty, without incurring the risk of an action at law for an alleged injury to private character. The principle applicable to cases in which the claim of privilege is set up is well settled. The difficulty lies in its application. No one can be held responsible for a statement or publication tending to disparage the reputation of another, if it is made in the discharge of a social or moral duty, or is required in order to protect one's own interest or that of another. In such cases, all that is necessary to render the words spoken or published privileged is, that they should be communicated, in good faith and without malice, to those who have an interest in the subject matter to which they relate, and a right to know and act on the facts stated. *Bradley* v. *Heath*, 12 Pick. 163. *Gassett* v. *Gilbert*, 6 Gray, 97.

Upon a careful consideration of the evidence offered at the trial of this case, we are of opinion that the occasion on which the words averred in the declaration were spoken did justify the defendant in making the statements, although they tended directly to injure the reputation of the plaintiff. This will be apparent when the time, place and circumstances of the utterance of the alleged slander are taken into view. The plaintiff, together with the two other persons named in the declaration, had made an application to the town of Wellfleet to reimburse them for expenses incurred in defending a suit brought against them as assessors for that town in the year 1852. This application was brought regularly before a meeting of the inhabitants of the town, by an article duly inserted in the warrant. The defendant was a taxpayer and voter in the town. The ground on which the town was asked to grant the indemnity was that the expenses had been incurred in a suit brought against the plaintiff and the other two assessors, in consequence of acts done by them in the due and proper discharge of their official duty. On the other hand, it was alleged by the defendant, and it was

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shown at the trial, that that action was in fact brought to recover damages of the plaintiff in this action and his co-assessors for making false answers under oath to interrogatories proposed to them in a previous suit brought in behalf of the town of Wellfleet against the collector of the town for the year 1852, for the non-collection of taxes by him. Under these circumstances, it is manifest that the defendant, as a voter and taxpayer, had an interest in the subject which was under consideration at the time the alleged slanderous words were spoken, and that he was speaking to those who had a like interest and a right to know and to act on any facts which were material and pertinent to the matter. If the action brought against the plaintiff and the other assessors was founded on their own wrongful act, in making false answers in the course of a judicial inquiry, it was certainly a good reason for refusing to grant them the indemnity for which they asked, and it was important that the persons present at the town meeting should be informed of the fact, in order that they might act and vote intelligently on the question before them. If therefore the defendant made the statement set out in the declaration in good faith, believing it to be true, and without actual malice towards the plaintiff, it was clearly a communication made in the discharge of a public duty by one who had an interest in the subject, to those who had a right to hear it, and upon a matter which was legitimately before them for action. The occasion rebuts the inference of malice, which the law would otherwise draw from the use of defamatory words; and the defendant cannot be held answerable for them, unless they are proved to have been uttered maliciously. It follows then that defendant was entitled to the instruction for which he asked at the trial, and that the court erred in refusing to rule that the plaintiff could not recover unless he offered proof of actual malice on the part of the defendant, in speaking the words set out in the declaration.

The other questions raised at the trial relate to the competency of evidence, and seem to have arisen out of the misapprehension that the defendant could not rely for his defence

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on the ground that the words were spoken under circumstances which rendered them privileged. It is therefore unnecessary to consider them in detail. It may be well, however, to say that if the case is again tried, the testimony of the defendant concerning his motives in speaking the words, his belief in their truth, and the absence of malice or ill will towards the plaintiff, will be admissible. Parties to civil actions are now made competent witnesses by statute. Their competency is not limited to any particular subject or issue. They may, like other witnesses, testify to any matter relevant and material to the case on trial. The good faith of the defendant, and the feelings which prompted him to speak the words alleged in the declaration, being properly in issue, he is competent to testify concerning them. *Exceptions sustained.*

EPHRAIM DOANE *vs.* JONATHAN ELDRIDGE & others.

If a collector of taxes gives a bond with sureties for the collection and the payment to the town and county treasurers of the amount of a tax which has been assessed, and for the collection of which he has received a warrant; and the assessors afterwards reassess and reduce the tax for excess of the overlay, and alter the sums named in the bond accordingly, without the knowledge of the obligors, and deliver no new warrant to the collector; no action can be maintained on the bond.

ACTION OF CONTRACT brought by the plaintiff as treasurer of the town of Harwich on a bond made to him by the defendant Jonathan Eldridge as principal, and by the other defendants as sureties; and submitted to the judgment of the court upon the following facts:

In 1857 the assessors of Harwich assessed a tax, amounting to $2572.82, and delivered a list and warrant for the collection of it to the defendant Eldridge, who was collector of taxes for the town; and thereupon the bond in suit was executed, the condition of which was, that Eldridge should levy and collect the tax according to the warrant, and pay to the county treasurer $200 by the 1st of the following December, to the town

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treasurer $1500 on or before the same day, and $872.82 by the 15th of the following January, and should otherwise discharge the duties of collector of taxes for said town.

The assessors afterwards discovered that the assessment was illegal, because the overlay was too large; and, solely to correct that error, reassessed the tax, reducing the amount of it to $2490.01; and, without the knowledge of the defendants, altered the bond accordingly, by changing the sum named as the gross amount to be collected from $2572.82 to $2490.01, and the second sum to be paid to the town treasurer from $872.82 to $790.01. No new list or warrant was ever delivered to the defendant Eldridge after this change in the assessment, and he proceeded to collect the tax.

This action was brought to recover an alleged balance remaining in the hands of Eldridge as collector of taxes, and the bond was declared on in its altered condition.

G. Marston, for the plaintiff.

J. M. Day, for the defendants.

METCALF, J. The alteration of the bond, after it was executed by the defendants, and without their consent, discharged them from all liability under it. It does not now truly represent the obligation into which they entered. That obligation was, that Jonathan Eldridge should act faithfully as collector of a tax of $2572.82, which had been already assessed. By the alteration of the bond, the obligation which it purported to impose on the defendants was, that the said Eldridge should act faithfully as collector of a tax of $2490.01, which was assessed after the bond was executed. This obligation they never consented to incur.

Suppose the bond had not been altered, or that it should now be regarded, in law, as if not altered, yet the defendants would not be liable under it; for there has been no breach of its condition. Indeed, it is only in its altered state that the plaintiff seeks to enforce it, by showing that its condition has been broken.

On the ground that the bond has been materially altered, without the defendants' consent, and the obligee now seeks to

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charge the obligors for breach of a contract into which they never entered — without expressing an opinion upon any other point raised in the defence — there must be

Judgment for the defendants.

Cornelius Hamblin & others *vs.* County Commissioners of Barnstable & another.

The regularity of the proceedings of county commissioners upon a petition for a jury to assess damages occasioned by the laying out of a town way, of the acts of the sheriff in summoning and impanelling the jury, of the hearing before them, the return of their verdict to the court of common pleas, and its acceptance and affirmance by that court, cannot after such acceptance and affirmance, without exception taken at the time, be disputed and contested by persons who have entered into a recognizance to pay all costs which might arise in such proceedings.

Under the Rev. Sts. c. 24, § 38, parties who have entered into a recognizance to pay the costs of proceedings upon a petition to county commissioners for a jury to assess damages occasioned by the laying out of a town way, if the verdict shall be adverse to the petitioner, are liable for costs if the amount of damages allowed to the petitioner by the selectmen of the town is not increased by the verdict of the jury.

A notice, ordered by the county commissioners to parties who have entered into a recognizance for the costs of the proceedings upon an application for a jury to assess damages sustained by the laying out of a town way, to show cause why a warrant of distress should not issue, and served by copy as directed, is sufficient, although the copies served are not attested by any officer.

Bill in equity for an injunction against the county commissioners of Barnstable County and their clerk, alleging that the plaintiff Hamblin, in October 1857, applied to the county commissioners for a jury to assess the damages occasioned by the laying out of a town way over his land by the selectmen of the town of Wellfleet, and entered into a recognizance with the other plaintiffs as sureties before the chairman of the county commissioners, conditioned to pay all costs and expenses which should arise by reason of his application and the proceedings thereon, if the verdict of the jury should "be adverse to" him; that the county commissioners thereupon issued a warrant for a jury, and the jury returned a verdict in his favor for a less sum than that awarded by the selectmen, which was returned

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into the court of common pleas at April term 1858, accepted and affirmed by that court, and certified to the county commissioners; that the commissioners thereupon issued their warrant to the county treasurer for the collection of the amount taxed as costs of the proceedings upon the petition, and the plaintiffs upon demand refused to pay it; that the commissioners, at a meeting on the 12th of April 1859, ordered notice to issue, to be served on the plaintiffs by copy, and by publication three times in the Yarmouth Register, to appear at an adjourned meeting on the 6th of July 1859, and show cause why a warrant of distress should not issue for the amount of such costs; that on the 6th of July the plaintiffs, appearing specially before the commissioners, objected to the sufficiency of the notice, because the only service thereof upon them was by enclosing to them a printed paper purporting to be a copy of it, but apparently cut out of a newspaper, and not signed or attested personally by any officer or authorized person; and, that objection being overruled, alleged, as causes why a warrant of distress should not issue, irregularities and informalities in the issuing by the commissioners of the warrant for a jury, in the summoning and empanelling of the jury by the sheriff, in the hearing of the case before the jury, and in the return of the verdict to, and its acceptance by, the court of common pleas, and also that they were not liable for costs under their recognizance, because the verdict was for the petitioner; all of which causes the county commissioners adjudged insufficient, and ordered the warrant of distress to issue for the costs of the proceedings on the application for a jury, and for the further costs of the notice to show cause.

The defendants filed a general demurrer, which was sustained by *Dewey*, J., and the bill dismissed. The plaintiffs appealed to the full court.

J. M. Day, for the defendants.

S. D. Parker, for the plaintiffs. 1. The bill states a case for the interposition of this court in equity. St. 1859, *c.* 196, § 50. Eden on Injunctions, 14, 69, & note. A writ of *certiorari* could be had only upon petition and notice, and would then be too

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late; and would be an inadequate remedy at any time. *Adams, Petitioners*, 10 Pick. 273. *Commonwealth* v. *Downing*, 6 Mass. 72. *Hill* v. *Sayles*, 12 Cush. 454.

2. The petitioner for a jury having obtained a verdict in his favor, he was the prevailing party, and the penalty of the recognizance was not forfeited.

3. The warrant of distress was issued without due notice to the petitioner.

Bigelow, C. J. This is a novel attempt to control and restrain the proceedings of an inferior tribunal, exercising *quasi* judicial powers, by means of a bill in equity. Under our practice, the more appropriate and efficient remedy in such cases would seem to be by *certiorari*, especially as this court now has power under Gen. Sts. *c.* 145, §§ 9, 12, not only to issue an injunction pending an application for a *certiorari*, but also to enter such judgment as the court below should have rendered, or to make such order or decree in the premises as law and justice require. But it is unnecessary to determine whether the plaintiff has adopted a suitable mode of reaching and correcting an error in the doings of the commissioners, because it is clear that he states no case in his bill, which entitles him to redress in any form of proceeding.

1. As to all matters alleged in the bill which relate to the proceedings before the commissioners on the application for a jury, and to the action of the sheriff in summoning and impanelling them, and in the hearing of the case before them, and upon the return and acceptance of their verdict by the court of common pleas, the plaintiff Hamblin has had full opportunity to be heard before the court of common pleas in the mode provided by law, and by taking exceptions to have the case determined by this court. Having omitted to take his objections seasonably, neither he nor his sureties on the recognizance for costs can now reopen the case and have a rehearing upon them in this proceeding or in any other.

2. The objections urged to the proceedings of the commissioners, in requiring the plaintiffs to pay on their recognizance the costs incurred by reason of the application for a jury, and

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the further objection to the authority of the commissioners to issue a warrant of distress, are clearly untenable. The jury by their verdict did not increase, but diminished the damages awarded by the commissioners to the plaintiff Hamblin, occasioned by the laying out of a town way through his land. He and his sureties on the recognizance were therefore liable to pay the costs and expenses of the trial before the jury, under Rev. Sts. c. 24, § 38. In the sense and within the meaning of the statute, he was the losing party, and consequently, according to the conditions of the recognizance, the verdict was "adverse to the petitioner." Under such circumstances, if the costs incurred by reason of the application for a jury were not paid by the persons who entered into the recognizance, the commissioners, after giving due notice, are authorized by Rev. Sts. c. 24, § 43, to issue a warrant of distress against them therefore, with further costs of the notice and warrant.

3. No precise form of notice to the principal and sureties in the recognizance is required. All that is required is that the notice should be reasonable. In the present case the plaintiffs had full and ample notice, and all the proceedings were regular and according to law. The plaintiffs therefore show no equity.

Bill dismissed.

OBED HOLMES & others *vs.* OBED BAKER & others.

By the St. of 1849, c. 206, two school districts since established, containing the same territory which, differently divided, previously constituted two of the school districts in the town, and in which new districts a school district tax has been assessed and collected, cannot within ten years be consolidated into one district.

Upon a bill in equity filed by ten taxpayers of a town, residing in a school district unlawfully created by a vote of the town to unite two previously existing lawful school districts, this court will restrain the assessors of the town from assessing a school district tax in pursuance of a vote passed at a meeting of such unlawful district, a person elected clerk of such unlawful district from doing any act as such clerk, and a person elected treasurer of such unlawful district from paying out money obtained by a sale of the schoolhouses belonging to the two previously established districts; although the bill is not filed till more than thirteen months after the vote of the town to unite the two districts, and, in the mean time, in pursuance of votes at meetings of the

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consolidated school districts, a school district tax has been assessed upon and collected of the taxpayers residing in it, against the written protest of some of them, and the schoolhouses of the two districts previously existing have been sold.

BILL IN EQUITY, filed on the 1st of May 1860 by ten taxpayers of Dennis, residing in the pretended school district numbered 13, alleging that in 1828 and 1829 that town was divided by geographical lines into eleven school districts, including the whole territory of the town, the limits of which remained unchanged until 1856, except that at some time before 1849 three of them were subdivided, increasing the whole number to fourteen; that in 1856 and 1857 the town was redistricted by dividing the whole territory by geographical lines into fourteen school districts, of which those numbered 13 and 14 were identical with two previously established, except that a strip of territory on which were eight dwelling-houses was transferred from that numbered 14 to that numbered 13; that in 1858 a school district tax was assessed and collected in the new district numbered 14; that at a town meeting held on the 7th of March 1859 the town voted to unite these two districts into one numbered 13; that in the same year a meeting was held in the new district thus established, at which Freeman G. Hall was chosen clerk, and it was voted to raise $2200 for a schoolhouse for the new district; that this vote was certified to the assessors, and the amount thereof assessed upon the residents of the new district, and collected of the plaintiffs and other inhabitants of the new district, against the written protest of some and by committing others of them to jail; that in November 1859 a second meeting of the new district numbered 13 was held, at which Howes Chapman was chosen treasurer of the district, and it was voted to sell the two schoolhouses belonging to the two former districts numbered 13 and 14, and to raise a further sum of $375, to be assessed on the inhabitants of the new district in October 1860; that pursuant to this vote said treasurer proceeded to sell the old schoolhouses and realized a considerable sum of money from the sale, and the clerk certified to the town assessors the vote to raise $375; that in 1859 the town voted to raise a large sum of money for the support of schools and

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directed a division of it among the various school districts, and a portion of this sum was applied by the general school committee to the support of a school in the new district numbered 13, but none was expended in the maintenance of any school in either of the old districts numbered 13 and 14, and a considerable portion of the sum raised was still in the hands of the town treasurer; and that at the annual town meeting in 1860 it was voted to raise another large sum of money for the support of schools, to be divided among the several school districts by the general school committee of the town for the year 1860.

The plaintiffs contended that the establishment of the new school district numbered 13, and the assessment of taxes in pursuance of a vote of such district, were unlawful, and that the old districts numbered 13 and 14 were still legal districts; and prayed that the general school committee might be compelled to apply a portion of the town school fund to the support of schools in them; and also prayed for injunctions against the town treasurer from paying out any money in his possession or which might come into his possession as the general town school fund, to the support of a school in the new district numbered 13; against the general school committee from maintaining any school in that district at the expense of the town; against the assessors from assessing any tax, and particularly a tax of $375, in pursuance of any vote of that district; against Hall from any further act as clerk of that district; and against Chapman from paying out any of the money derived from the sale of the schoolhouses of the two old districts.

Upon the filing of the bill a temporary injunction was granted as prayed for, which was afterwards, on motion of the defendants, modified so far as to permit the school committee of the town to maintain a public school or schools in the schoolhouse of the new school district, and to allow the town treasurer to pay for the same out of any money already in the town treasury, or any money already raised and appropriated by the town for the support of schools.

The defendants filed answers, admitting the facts alleged in

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the bill, and alleging that the new district had been legally established; and the case was heard upon the bill and answers, and reserved by *Hoar*, J. for the consideration of the full court.

B. Sanford, for the plaintiffs, upon the question of jurisdiction, cited *Mohawk & Hudson Railroad* v. *Archer*, 6 Paige, 83; *Oakley* v. *Trustees of Williamsburgh*, 6 Paige, 262; *Champlin* v. *New York*, 3 Paige, 573; *Cooper* v. *Alden*, Harrington, (Mich.) 72; and upon the merits, *Sts.* 1849, *c.* 206; 1851, *c.* 303; *Blankinship* v. *Hadley*, 11 Gray, 431; *Gustin* v. *Fifth School District in Danvers*, 10 Gray, 85.

G. Marston, for the defendants. The *St.* of 1849, *c.* 206, limiting the previous general law, by which towns might reconstruct school districts at their pleasure, should be strictly construed. It forbids only the change of district lines in such a way as to change land from district to district using different schoolhouses. The only substantial relief prayed for is against the tax for $375. The plaintiffs have no equity, because they have delayed so long to seek relief. If the new district is not legally established for the purpose of taxation, it is for all other purposes.

CHAPMAN, J. Under the *St.* of 1849, *c.* 206, the town of Dennis, by a change made in its school districts in the years 1856 and 1857, exhausted its power to make further alterations so as to affect the taxation of lands as therein mentioned, for the space of ten years. The vote of 1859 uniting the districts numbered 13 and 14 into a new district made such a change as the statute forbids; because under it the lands of proprietors in each district became liable to a new and essentially varied taxation for school purposes. The vote was therefore void; and the organization of the new district was void.

A bill in equity is the only process which will give the plaintiffs an adequate remedy. The redress which could be obtained by suits at law would not only involve the parties in much litigation, but would be imperfect. The plaintiffs have been guilty of no delay or negligence which should deprive them of a remedy by injunction against the future illegal proceedings of the defendants. *Injunction as modified made perpetual*

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Caroline F. Paull *vs.* Edmund Padelford.

On the trial of a bastardy process, the respondent cannot ask the complainant on cross-examination whether she has had criminal intercourse with other persons more than ten months and twelve days before the birth of her child; nor introduce evidence that the complainant's character for chastity was bad for two or three years before the child's birth.

Bastardy process. At the trial in the superior court in Bristol before *Vose*, J., the complainant testified to two acts of intercourse between herself and the respondent, one on the 29th of May 1859, and one in July following, and that these were the only ones which they ever had together; and it was admitted that her child was born on the 12th of February 1860.

The respondent asked the complainant, on cross-examination, whether before the 29th of May 1859 she had had any criminal intercourse with other persons. But the judge ruled that the inquiry must be limited to the months of April and May 1859.

The respondent offered evidence that the complainant's character for chastity had been bad for two or three years, stating that it was offered, not to impeach her character for truth, but because it would tend to show that during the time covered by the testimony, including the time fixed by the complainant as the time when the child was begotten, she was having intercourse with other persons. But the judge excluded the evidence. The jury found the respondent guilty, and he alleged exceptions.

C. I. Reed, for the respondent.

B. Sanford, for the complainant.

Merrick, J. The evidence offered by the respondent was properly rejected. *Phillips* v. *Hoyle*, 4 Gray, 568. And no reason has been assigned which is sufficient to justify or authorize the inquiries which he proposed to make of the complainant relative to the question whether acts of intercourse between her and some person other than himself had not taken place more than ten months and twelve days previously to the birth

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of her child; or to show that his exceptions to the ruling of the court excluding those inquiries ought to be sustained.

Exceptions overruled.

ELBRIDGE G. DEAN *vs.* WILLIAM LINDSEY.

A field-driver, who takes oxen going at large in a public highway without a keeper, with the intention of driving them to the town pound, and, before driving them to the pound, drives them into his own yard, goes a third of a mile to find the owner, and, having found him, says to him, "I have taken two of your oxen and put them in my yard, and if you don't come after them, I shall drive them to the pound," is not liable to the owner for a conversion of the cattle.

ACTION OF TORT for the conversion of a yoke of oxen. The defendant admitted and justified the taking as a field-driver of the town of Taunton.

At the trial in the superior court before *Wilkinson*, J. it appeared that the defendant was a field-driver of Taunton; that, finding the oxen feeding in the public highway without a keeper, he drove them into his own yard, and fastened them in, and then went to the plaintiff's house, about a third of a mile distant, found the plaintiff in his barn, and said to him, "I have taken two of your oxen and put them in my yard; and if you don't come after them, I shall drive them to the pound;" that the plaintiff replied, "You have been wanting to make a fuss; now you have got them, you have a chance;" and that the defendant then returned to his own house, wrote some notices and immediately drove the oxen to the pound, and gave the notice required by law in cases where cattle are legally taken up and impounded.

The plaintiff asked the judge to instruct the jury, "that if the defendant drove the cattle from the public highway into his own private yard, for the purpose of notifying the plaintiff that they were there, and of giving him an opportunity to come and take them away, and did notify, as appeared by the testimony, he could not afterwards, upon his return home, be justified in law, as a field-driver, in proceeding to impound the oxen in

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the town pound; that such acts were not a compliance with the statute which required him forthwith to impound them in the town pound; and that these facts showed an unnecessary delay in the impounding after the cattle were taken in the highway."

But the judge instructed the jury "that if they believed that the defendant took the oxen up in the highway, and fastened them in his own yard, and for the purpose of accommodating the plaintiff kept them there until he had seen the plaintiff, and told him, as testified, and gave him an opportunity to take them away, before he proceeded to impound them in the town pound, it was not an unreasonable delay; and that it was a compliance with the requirements of the statute." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. Brown, for the plaintiff, cited *Marblehead Mutual Fire Ins. Co.* v. *Underwood*, 3 Gray, 210; *Byron* v. *Crippen*, 4 Gray, 312; *Sherman* v. *Braman*, 13 Met. 407.

E. H. Bennett, for the defendant.

Merrick, J. The defendant was a field-driver in the town of Taunton. He found the plaintiff's oxen at large in one of the public highways therein, not under the care of any person; and took them up, as he had a right to do. Rev. Sts. *c.* 19, § 22. It was his duty forthwith to impound them in the town pound. Rev. Sts. *c.* 113, § 1. Before driving them to the pound, he shut them up in his own yard, and went a third of a mile to the plaintiff, gave him notice of what had been done, and offered to give them up to him if he would take care of them. This offer was declined, and the oxen were immediately afterwards driven to the town pound, and delivered into the care and keeping of the pound-keeper. It was in reference to these facts, that the instructions which the court declined to give were asked for by the plaintiff.

The delay which occurred by giving notice to the plaintiff is not inconsistent with the performance of the duty required of the field-driver forthwith to impound the animals taken up. The plaintiff was the only person who could suffer, or who had

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therefore any right to complain of any failure on the part of the defendant to conform to the requirements of law. The offer to give the cattle up was for his benefit. If it had been accepted, he would have been relieved from the payment of the charges which could lawfully have been made against him. The time occupied in making this communication and offer to him must have been very inconsiderable; and considering the relation of the parties to each other, it does not appear to have been unreasonable that, before actually committing the cattle to the pound, the field-driver should have delayed upon the way long enough to offer to surrender them to the owner. Proceeding to the full and complete discharge of his duty as soon as the offer on his part was declined, we think it may fairly be said that he did, after taking the cattle up, forthwith cause them to be driven to the pound and impounded. His diligence did not fall short of the requirements of the statute.

He would not indeed have been justified in taking up the cattle, merely for the purpose of confining them in his own yard; but if he took them, as he had a right to do, because they were at large without a keeper upon a public highway — and his intention to this effect is apparent from the facts reported — he might, in performance of the duty imposed upon him, have confined them there until he could with reasonable diligence and despatch have driven them to the pound. The delay which occurred not having been unreasonable, either in point of time, or on account of the object and purpose which occasioned it, the law is a justification of his proceedings; and no action can be maintained against him as a trespasser, either because he had no authority to take up the cattle, or because by his negligence and delay in impounding them there was an abuse of the authority under which he was entitled and required to act. *Exceptions overruled.*

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Edmund H. Bennett, Judge of Probate and Insolvency, *vs.* Richard G. Overing & others.

If an administrator, who has been licensed to sell more of the real estate of his intestate than is necessary for the payment of debts, and has given a special bond as required by the Rev. Sts. *c.* 71. § 6, to account for the surplus proceeds, is also guardian of the heirs at law of his intestate, who are all minors, and expends such surplus proceeds for the maintenance of his wards, it is his duty, in his administration account, to charge himself with such proceeds and credit himself with the sums expended for his wards as paid to himself as guardian; and if he neglects to render such account of the surplus proceeds in the probate court, he and his sureties on the special bond are liable in an action thereon for such surplus proceeds, deducting so much thereof as may be allowed to him in the settlement of his guardianship account in the probate court, as properly expended for the maintenance of his wards; and if he has rendered no account as guardian, an opportunity will be afforded to him to do so after judgment for the penalty of the bond.

Under the Rev. Sts. *c.* 70, § 10, an action may be brought in this court upon a special bond given under *c.* 71, § 6, by an administrator, licensed to sell more real estate than is necessary for the payment of debts, to account for the proceeds.

Upon a special bond given under the Rev. Sts. *c.* 71, § 6, by an administrator licensed to sell more real estate than is necessary for the payment of debts, to account for the surplus proceeds, an action will lie after neglect for an unreasonable time to render such an account in the probate court, although he has not been cited to do so.

Action of contract, brought for the benefit of the next of kin of Norris Anderson, upon a bond made on the 15th of May 1839 to the judge of probate for the county of Bristol by the defendant Overing as principal and the other defendants as sureties, under the Rev. Sts. *c.* 71, § 6, upon his being authorized as administrator of Anderson to sell all the real estate of his intestate, because by a partial sale the residue would be injured; and conditioned that Overing "in the sale thereof shall faithfully observe the rules and directions of law in the sale of real estate by executors and administrators, and shall account for and make payment of all the proceeds of said sale that shall remain after the payment of debts and charges for which the land was sold, agreeably to the rules of law in such case provided." Writ dated February 19th 1859. The case is stated in the opinion.

T. M. Stetson, (*T. D. Eliot* with him,) for the plaintiff.

R. C. Pitman, for the defendants.

Chapman, J. It appears by the pleadings and the agreed statement of facts, that Overing, who was administrator of

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the estate of Norris Anderson, deceased, had occasion to sell a part of the real estate of the deceased for payment of debts, and had license to sell the residue on the ground that it would be injured by a partial sale, and the bond in suit was given upon this license under the Rev. Sts. *c.* 71, § 6. After making the sale and paying the debts, it is agreed that there remained in his hands the sum of $610.50, as stated in the declaration. Since making the sale, he has not rendered any account in the probate court. The deceased left three minor children of whom Overing was guardian, and he has rendered no account of his guardianship; but he alleges in his answer that he has expended the whole of the money for boarding and clothing two of the minors; and it is agreed that he would testify to this expenditure, and would also testify that after payment of the debts he considered that he held the balance in his hands as guardian of said minors, and with the intent to dispose of and use the same for their benefit, but that he did no act to transfer said balance to himself in his capacity of guardian. The sureties in the bonds which he has given are interested as well as himself in the questions arising upon this state of the case. Guided by the language of the Revised Statutes, we should come to the following conclusions:

The form of the administration bond as prescribed in *c.* 64, § 5, taken in connection with *c.* 65, §§ 8, 9, authorizing the sale of real estate to pay debts, and providing that the administrator shall be accountable as to such sales on his administration bond, shows that this bond was not designed to apply to the sale of the residue. But the statutes treat such sale as a special trust; and chapter 71, which authorizes the sale, provides a separate and special bond for it. By § 6, "when the administrator is licensed to sell more than is necessary for the payment of debts, he shall before the sale give bond with sufficient surety or sureties to the judge of probate for the county in which he was appointed, with condition to account for all the proceeds of the sale that shall remain after payment of the debts and charges for which the land was sold, and to dispose of the same according to law." This language is not obscure. It does not

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apply to so much of the proceeds of the sale as is needed for payment of debts and charges, but leaves the administrator to account for that part under his general bond. As to the balance, he is to account for it under this bond, and dispose of it according to law. The first mentioned duty is to account for it, and the account is to be rendered in the probate court, and nowhere else. On the presentment of an account in that court, all parties may be heard, and provision is made for determining all their rights.

If he is to pay it over to himself as guardian, still the account is to be rendered in the probate court, where interested parties can be heard, and where the account can be most properly settled. When his account is allowed there, crediting the money to himself as administrator, and charging it to himself as guardian, the special trust is fulfilled, and the condition of the special bond is performed. He then becomes liable on his bond as guardian, and not till then. He may indeed use the funds as guardian for the benefit of the wards before rendering an account under his special bond; and in such case equity will regard him as having in his capacity of executor furnished the funds to himself as guardian. *Mattoon* v. *Cowing*, 13 Gray, 387.

If a third person had been guardian and the funds had been paid to him, but no account had been rendered, it would be similar to this case in its substantial equity. In the case of *Mattoon* v. *Cowing*, already cited, two suits were pending. One of them was upon the general bond, and also on the special bond given for the sale of real estate more than was necessary to pay debts; and the other was on the guardian's bond. The court had the whole matter before it; and therefore ordered the allowance to be made to the executor for what he had actually expended for the benefit of the wards as guardian; but remarked that it would have been more correct in form, if these sums had been credited, in making up his account as executor, as paid over to the guardian, and charged to the guardian as received from the executor. But in the present case it would be more convenient and proper to have the settlement regularly made in the probate court; especially as a question is made in regard to the propriety of expending the whole sum for the bene-

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fit of two of the wards. If it shall appear upon the settlement of a guardianship account that Overing has expended money which ought properly to be allowed to him as guardian, the same sum should be allowed him on the special bond, and judgment should be rendered against the defendants for the balance.

The case of *Fay* v. *Taylor*, 11 Met. 529, is relied on by the defendants to sustain the position that there is no liability upon this bond. But that case was not like the present. It was upon a bond given by a guardian upon a license to sell real estate of the ward, with condition to account for the proceeds. It was held that this condition being thus special and limited, it related only to the management of the sale and its preliminaries and the investing of the proceeds; and that when he took these proceeds into his hands, he held them under his general bond. But the present is a different bond with a different condition, and the duties which it requires are different.

It is objected that this is not such an administration bond as by the Rev. Sts. *c.* 70, § 10, may be sued in this court. But the court are of opinion that the provisions of that statute, fairly interpreted, extend to this as an administration bond.

It is further objected that if it is such a bond, no action lies upon it till Overing has been cited to render an account in the probate court. The case of *Brooks* v. *Brooks*, 11 Cush. 18, is cited to this point. But the decision in that case related to a guardian's bond, the condition of which is, as before remarked, very different from this, and requires accounts to be rendered at such times as the court shall direct. Rev. Sts. *c.* 79, § 5. The condition of this bond requires the administrator to account for all the proceeds of the sale that shall remain after payment of the debts and charges for which the land is sold, and to dispose of the same according to law Within the terms of this condition the account should be rendered in a reasonable time. The administrator has been guilty of unreasonable neglect in this case, and is subject to the action.

Judgment is to be rendered for the penalty of the bond, and the case must be postponed in order that accounts may be settled in the probate court in conformity with the principles above stated. *Judgment for the plaintiff accordingly.*

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Alice Coombs *vs.* Elijah R. Read.

Personal property bought in another state by a woman married there and removing into this state with her husband before the passage of *St.* 1857, *c.* 249, out of the proceeds of notes owned by her at the time of her marriage, and never reduced to possession by her husband; as well as personal property acquired in like manner in this state before the passage of the same statute; and personal property acquired in this state after the passage of the statute, in part by an exchange of property acquired in the other state as before stated, and in part by a payment of money out of the proceeds of the same notes; is liable to attachment in this state for the debts of her husband, in the absence of evidence of any law of the state in which the marriage took place, adding to the rights of married women at common law to hold personal property.

Action of tort against a deputy sheriff for the conversion of two cows and a horse attached by him on mesne process against the plaintiff's husband on a debt due in May 1858. The parties submitted the case to the judgment of the court upon the following facts:

The plaintiff and her husband on the 1st of January 1856 were married in Rhode Island, where they resided, and the plaintiff afterwards bought two cows and a horse with money collected by her on notes due her at the time of the marriage, and which never came into her husband's hands or possession. The plaintiff and her husband continued to live together as man and wife in Rhode Island until the 1st of April 1857, when they removed to Attleborough in this commonwealth, bringing the cows and horse with them, and have since lived together here. In September 1857, at Attleborough, she exchanged the horse, paying ten dollars in the exchange, for another, which was the horse attached by the defendant. In the spring of 1857 she bought another cow in Attleborough, which, with one of those brought from Rhode Island, were the two cows attached by the defendant. All of the property was bought by the plaintiff alone, and with money belonging to herself alone, and which she never allowed her husband to have in his possession or control.

C. I. Reed, for the plaintiff.

J. Daggett, for the defendant.

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DEWEY, J. There is nothing in this case to show that the plaintiff had by virtue of the laws of Rhode Island any greater interest in the property brought from that state to Massachusetts, on her change of domicil to the latter state, than existed under the common law. By the common law, marriage operates as an absolute gift to the husband of all the personal chattels which are in possession of and owned by the wife at the time of her marriage. The husband has also the like interest in all personal chattels which come to the wife in her own right during coverture. Clancy on Husband & Wife, 2. As to choses in action held by her under like circumstances, a different rule of law existed, and the right of the husband was a more qualified one, requiring him to reduce the same to possession by collecting them, if he would enjoy them as absolutely his. At common law, it does not affect the absolute ownership of personal chattels acquired by the wife during coverture, that they were purchased with her money, or money received by her upon notes held by her in her own name and not reduced to possession by her husband. When she becomes the owner of personal chattels, such chattels vest absolutely in her husband, without any act of reduction to possession as his property. Such personal chattels, like those acquired by himself by his labor or money, are his, and attachable as his property.

It was under this state of the ownership of this property, so far as they or either of them held the same at that time, that the plaintiff and her husband became residents of Massachusetts on the 1st of April 1857. The *St.* of 1857, *c.* 249, took effect subsequently; but she acquired no new right as to this particular property by virtue of that act.

Subsequently to their removal to this state, in the early part of the year 1857, and before the *St.* of 1857, *c.* 249, took effect, the plaintiff purchased a second cow. But, as already stated, upon the purchase of a personal chattel by the wife, the property vested absolutely in her husband by the common law.

The horse, now the subject of controversy between the parties, was acquired by an exchange of the horse brought from Rhode Island, which exchange was made by the act of the

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wife, she paying ten dollars in the exchange, from money belonging to herself, and which had not been in her husband's possession or control. As this transaction was after the *St.* of 1857, *c.* 249, had gone into effect, if the horse then purchased had been purchased wholly by her money, the question would have properly arisen, whether under that statute this horse would not have been her separate property, and exempt from attachment by her husband's creditors. But in our opinion that case does not arise upon the facts. This horse was acquired by an exchange of a horse which was her husband's, and as such liable to attachment. We must assume that the principal value paid in exchange was the horse of the husband, and that it was not intended by the exchange to defraud creditors. The husband should, under these circumstances, be considered as having an attachable interest in the horse received in exchange.

Judgment for the defendant.

FREEMAN BAXTER *vs.* LUTHER PAINE.

The holder of a promissory note, who gives it up to the maker under a mistaken impression that it has been paid in full, may recover the balance unpaid in an action for money lent.

An allegation of time in a declaration for money lent is surplusage.

ACTION OF CONTRACT for thirty dollars as money lent to the defendant on the 29th of July 1856.

At the trial in the superior court, the plaintiff testified that in 1852 he lent to the defendant the sum of five hundred dollars, and took his note for the amount, secured by mortgage; that in 1856 the defendant made a note for the same amount, and secured by mortgage, payable to the Providence County Savings Bank, and gave it to the plaintiff, who took it to the savings bank, had it discounted, and the proceeds (which he supposed amounted to the whole face of the note) placed to his own credit, and gave up the original note to the defendant; that the amount in fact placed to the plaintiff's credit at the savings

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bank was thirty dollars less than the face of the note, the bank having reserved that amount for the first year's interest; and that the plaintiff, upon discovering that fact, called upon the defendant, explained the matter to him, and demanded payment of the thirty dollars, and the defendant promised to pay it in a few days.

The defendant contended that there was a variance between the declaration and the proof. But *Ames*, J. ruled otherwise, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. W. Thrasher, for the defendant.

W. W. Blodgett, for the plaintiff.

CHAPMAN, J. This case does not raise the question whether a promissory note can be given in evidence upon a count for money lent. It presents a case of money actually lent. A promissory note was taken for it by the plaintiff, but afterwards cancelled and given up under the mistaken belief that it had been fully paid. It seems to have been a mutual mistake. The balance of the money lent was still due, though there was no note in existence to declare upon. The allegation of time in the count is immaterial, being mere surplusage.

Exceptions overruled.

ROBERT L. THURSTON & others. *vs.* CHARLES HORTON & others.

A person cannot be charged as a copartner in business carried on at a mill, for the price of a steam-engine and machinery erected in the mill under a written contract with another person admitted to be a copartner, by proof of his being owner as tenant in common of the mill with those admitted to be copartners; and of his having said that the engine was satisfactory, and that when the mill was built he was a partner in the concern, but had since sold out to the others.

ACTION OF CONTRACT for the price of a steam-engine and machinery. The defendants were all defaulted, except James W. Horton.

At the trial in this court, the plaintiffs offered evidence tending to show that the defendant Charles Horton contracted

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in writing with them to construct a steam-engine and machinery for a mill in Seekonk, representing it to be his property, (there being no evidence whether the other defendants knew of this representation,) and that they accordingly constructed and delivered the same and set them up in the mill; and that the title to the land on which the mill was built was not in Charles Horton, but by a deed, dated, executed and acknowledged before the making of the contract, though not recorded till afterwards, had been conveyed to the other defendants named in the writ. One of the plaintiffs testified that while they were putting in the engine he was at the mill and saw James W. Horton there, and heard him say that the engine was satisfactory, or words to that effect; and that on another day soon after, at the mill, he told the witness that when the mill was built (which was proved to have been a short time before the engine was put in) he was one of the partners in the concern, but afterwards sold out to his brothers. *Hoar*, J. instructed the jury that this evidence did not maintain the action against James W. Horton; and after a verdict for him, reported the case for the decision of the full court.

C. W. Thrasher, for the plaintiff.

B. Sanford, for the defendant.

Merrick, J. To maintain this action against James W. Horton, by whom alone it is defended, it was necessary that the plaintiffs should show, that either at the time when the contract for the steam-engine was made, or when it was finished and set up in the mill, he was a copartner of the other defendants. Upon this question they failed to produce sufficient evidence to establish the fact which it was incumbent on them to prove. James W. Horton was an owner as tenant in common with the other defendants of the mill in which the steam-engine was placed; but that did not constitute him a partner with them, either in the ownership of the machine, or in the transaction of the business in connection with which it was to be used. Beyond the mere fact of his interest in the real estate, the only additional evidence offered to prove that he was a member of the partnership was derived from what he

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had himself said upon the subject; and as nothing was shown to controvert his statements, they must of course be taken to be true. 1 Greenl. Ev. § 201. His remark upon one occasion in the mill that the engine was satisfactory proves nothing against himself; it referred only to the qualities or working capacity of the machine, and not at all to the liability of those by whom it was to be paid for. He said upon another occasion that when the mill was built he was one of the partners in the concern, but that he afterwards sold out to his brothers. This statement, so far from showing that he had any interest in the operations which were being carried on by the other defendants, when the engine was contracted for or put into the mill, has a tendency to show that he was wholly disconnected from them. The whole evidence produced could not have warranted the jury in finding a verdict against him upon the issue to be determined; and if they had done so, we think the court, upon a motion to that effect, would have felt itself constrained to set it aside as a verdict against evidence. *Judgment on the verdict.*

Harlous W. Wetherell *vs.* City Fire Insurance Company.

A policy of insurance against fire, containing a provision that it shall cease and be of no force or effect if the premises insured shall be appropriated, applied or used for the purpose of carrying on or exercising any trade, or of keeping or storing any article, denominated hazardous or extra-hazardous in the terms and conditions annexed to the policy, in which, among other things, "sailmakers" are denominated hazardous, and "confectionery and confectionery manufacturers" extra-hazardous, is rendered void by a hiring of a portion of the building insured for a sail-loft, and carrying in a sailmaker's stock and tools, although without commencing work, and by the keeping of a small quantity of confectionery in glass jars on a counter or shelf in a room occupied as a barber's shop in the building insured.

A policy of insurance against fire, effected by a mortgagor out of possession, which by its terms is to cease and be of no effect if the premises insured shall be used for certain specified purposes, may be rendered void by the use of them for such purposes by a lessee of the mortgagee in possession.

Action of contract on a policy of insurance upon the plaintiff's dwelling-house and store, in which "it is agreed

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and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandise in the same terms and conditions denominated hazardous or extra-hazardous, or included in the memorandum of special rates, unless herein otherwise especially provided for, or hereafter agreed to by this company in writing and added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease and be of no force or effect." Annexed to the policy were lists of trades and occupations, goods, wares and merchandise, denominated "hazardous," including "sailmakers;" and "extra-hazardous," including "confectionery and confectionery manufacturers."

The case was submitted to the judgment of the superior court upon an agreed statement of facts, in substance as follows:

The property owned and insured by the plaintiffs was subject to a mortgage. The mortgagee had taken possession for the purpose of foreclosure, and had let the dwelling-house to various persons, one of whom occupied a portion of it as a barber's shop, but also kept confectionery for sale, in glass jars, on his counters and shelves, generally of an aggregate value of about fifteen dollars at a time. The mortgagee, after taking possession, also let the whole store by parol to one Mylod, who, about a fortnight before the fire, let the upper part thereof to Beard & Jordan for a sail-loft. Beard & Jordan carried in a sailmaker's stock and tools, of the value of about one hundred and fifty dollars, and expected to commence work the next day after the fire, but had not done any work there up to that time. The fire did not take in this part of the store, but in the part occupied

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by Mylod; thence spread to the dwelling-house, which was about fifteen feet from the store; and injured both buildings more than the amount insured thereon.

Upon these facts, *Vose*, J. gave judgment for the plaintiff, and the defendants appealed.

E. H. Bennett, for the plaintiff, cited *Loud* v. *Citizens' Mutual Ins. Co.* 2 Gray, 221; *Sanford* v. *Mechanics' Mutual Fire Ins. Co.* 12 Cush. 541.

C. I. Reed, for the defendants.

CHAPMAN, J. The occupation of the buildings insured, one for a sailmaker's shop and the other for selling confectionery, was directly contrary to the terms of the policy, and rendered it void. *Lee* v. *Howard Fire Ins. Co.* 3 Gray, 583. *Macomber* v. *Howard Fire Ins. Co.* 7 Gray, 257.

Judgment for the defendants.

ALFRED CASE *vs.* GEORGE H. BABBITT.

In an action brought by the defendant in replevin against the officer who served the writ, for taking an informal bond, by reason of which the replevin was dismissed on the defendant's motion, the officer may show in mitigation of damages that the property replevied was, at the time of the service of the replevin, and has since remained the property and in possession of the plaintiff in replevin.

DEWEY, J. This is an action of tort to recover of the defendant, a deputy sheriff, damages for taking an informal bond in a replevin suit commenced by Venus Macomber against the plaintiff, by virtue of which writ he took from the possession of the plaintiff various articles of personal property. The action of replevin, after entry of the same, was on motion of the defendant in that suit, who is the plaintiff in the present one, dismissed for informality in the bond, and a return ordered of the property to the defendant in replevin. The question now before us is, whether the defendant can be allowed to introduce evidence, in mitigation of damages, to show that the property thus taken

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by him was the property of another person than the present plaintiff, namely, the property of Venus Macomber, and that the same is now in his hands, as owner.

In actions of tort for misfeasance of an officer, where there has been no wilful act of wrong doing, the rule of this court has been to allow evidence to be introduced to show the real extent of the loss and thus materially to diminish the damages below the sum which *prima facie* the plaintiff would be entitled to recover. It was thus permitted in *Weld* v. *Bartlett*, 10 Mass. 470, where the action was in case for neglect of duty in not taking bail, where the officer had arrested the debtor, and returned falsely upon the writ that he had taken bail. The same rule has been adopted in several analogous cases. *Rice* v. *Hosmer*, 12 Mass. 127. *West* v. *Rice*, 9 Met. 564.

Treating the act of the defendant, in serving the writ of replevin without a proper bond, as an unauthorized taking — and this was the real nature of it — we find several cases sustaining the position that where there has been a wrongful taking of personal chattels, and an action brought for such taking, it is competent for the defendant to show, in mitigation of damages, that the property has, since the taking by the defendant, passed into the possession of the real owner, or been applied to his use, in some legal form. Thus in *Haley* v. *Shed*, 10 Met. 317, the defendant was allowed to show, in mitigation of damages, that the property had been taken from him by an attachment in an action against the plaintiff. The case of *Squire* v. *Hollenbeck*, 9 Pick. 551, is perhaps more in point, as the damages were allowed to be reduced by showing that a third person was the owner of the property which had been taken from the possession of the plaintiff, and that it had gone to the use of the owner; and this was allowed, although the defendant in taking the same had acted without any authority. It was said by the court in that case, "possession is *prima facie* evidence of title; and unless the contrary is shown, it is sufficient to entitle the plaintiff to recover for the value. But here, if the allegation of the defendant can be made out by proof, the plaintiff is not answerable over."

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The strong objection urged against the admission of such evidence in reduction of damages is, that if the defendant was a wrongdoer in the original taking of the property, he ought now to be charged with the whole value of it, and this irrespectively of the fact that it has since passed into the hands of a third person entitled to it, or been applied to the use of the true owner. This subject was again considered in the case of *Perry* v. *Chandler*, 2 Cush. 237, where in an action of trespass for a wrongful taking of personal chattels, and where the court held, as matter of law, that they were wrongfully taken, yet the defendant was allowed to show, in reduction of damages, that the nature of the plaintiff's title was such, that it was liable to be defeated by proceedings in bankruptcy against his vendor, and that such proceedings had taken place since the alleged trespass, and the property had been applied for the benefit of the creditors of the bankrupt.

In all such cases it is, however, essential to show that the property has actually gone to the use of the real owner. A mere outstanding title in a third person would furnish no ground for the reduction of damages, for one who had wrongfully taken the property from the possession of the plaintiff and continued to hold the property, or had applied the same to his own use.

The action of replevin, by which this property was taken from the plaintiff, was on his motion dismissed, as having no standing in court. The effect of such dismissal was to dispose of the case without any adjudication upon its merits, or any hearing as to the title in the property. The articles replevied remain now as much the property of the plaintiff in this action as before the taking on the replevin writ. The taking of the articles by a writ of replevin, and delivery of the same to Macomber, did not change the ownership, or vest the title in Macomber. Upon the dismissal of the action without any hearing or adjudication as to title, the right of Case remained as before. He may demand and recover of any person, in whose hands the same is, the property or the value thereof, if he is the real owner. *Lockwood* v. *Perry*, 9 Met. 440. The inconvenience which he suffers is the deprivation of possession, if

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the property was not his, and he had no other title than possession.

It is urged, however, on the part of the plaintiff, that if a proper replevin bond had been taken, such bond might have been put in suit, and that the obligors could not have set up in defence property in a third person. However that may be, it is not to be assumed that if a proper bond had been taken, and the action had been heard upon its merits, any order for a return would have been made. That would have depended upon the fact of the plaintiff's ownership of the property, the very matter which the defendant denies. If the case had proceeded to trial, and the right of property had been established in the present plaintiff, and thereupon an order of the court made for a return, and the plaintiff had lost his security for the performance of such order through the misfeasance of the defendant, that might have presented a case where the defendant would be estopped from setting up a title in a third person in mitigation of damages. But in the absence of any such adjudication upon the question of property in the plaintiff, a different rule must prevail. The plaintiff can only recover for the damages which he has sustained by the acts of the defendant. The possession of the plaintiff of the property is *prima facie* evidence of ownership of the same; but if the defendant can control it by evidence produced by him, and establish the fact that the property was in a third person to whose possession and use the same has gone, the plaintiff has lost nothing, except the interference with his temporary possession. We have not found in the cases cited for the plaintiff any sufficient reasons for coming to a different result. *Exceptions sustained.*

B. Sanford, for the defendant.

E. H. Bennett, for the plaintiff, cited *Yea* v. *Lethbridge*, 4 T. R. 433; *Jeffery* v. *Bastard*, 4 Ad. & El. 823; *Baker* v. *Garratt*, 3 Bing. 56; *Swift* v. *Barnes*, 16 Pick. 194; *Seeley* v. *Brown*, 14 Pick. 177; *Walbridge* v. *Shaw*, 7 Cush. 560; *Flagg* v. *Tyler*, 3 Mass. 303; *Smallwood* v. *Norton*, 20 Maine, 83; *Greely* v. *Currier*, 39 Maine, 516; *Sartin* v. *Weir*, 3 Stew. & Port. 421; *Buckmaster* v. *Beames*, 4 Gilm. 443.

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Horace Kent, Executor, *vs.* Elijah R. Reed.

At the trial of an action by a mortgagee of personal property (whose mortgage provided that the mortgagor might retain possession until default, but that upon any attachment by any other creditor of the mortgagor the mortgagee might take immediate possession) against an officer attaching it as the property of the mortgagor, such attachment was admitted, but there was no evidence that the mortgagee had taken possession. The judge declined to rule that the plaintiff had shown no sufficient right to the mortgaged property to maintain the action, and submitted the case to the jury under other instructions not excepted to. *Held*, that the defendant had no ground of exception.

Action of tort for taking and converting certain articles of personal property of Seba Kent, the plaintiff's testator.

Trial in the superior court before *Wilkinson*, J. who signed a bill of exceptions, stating that the plaintiff gave in evidence a mortgage of the property from Lewis Kent to Seba Kent, in which it was provided that until default in the performance of the condition the mortgagor might remain in possession, but that, if the property or any part of it should be attached by any other creditor of the mortgagor, the mortgagee might take immediate possession.

The rest of the bill of exceptions was as follows: "There was no evidence that Seba Kent had taken possession of the mortgaged property before the taking complained of. But it was admitted that the defendant took the property by way of attachment as the property of Lewis Kent, the mortgagor. Upon this part of the case the defendant asked the court to rule that the plaintiff had shown no sufficient right to the mortgaged property in Seba Kent, to maintain the present action. But the court declined so to rule, and the case was submitted to the jury upon other instructions not excepted to, who returned a verdict for the plaintiff. The defendant, feeling aggrieved by the foregoing refusal of the court, excepts to the same."

J. Daggett, for the defendant.

B. Sanford & J. E. Sanford, for the plaintiff.

Dewey, J. The right of immediate possession to the property alleged to have been taken by the defendant was duly

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established by the plaintiff, by proof of the happening of the contingency stated in the mortgage from Lewis Kent to the plaintiff's testator, namely, an attachment of the property by a creditor of the mortgagor. That such attachment had been made was admitted at the trial.

No question is presented upon the bill of exceptions upon the point now proposed to be argued by the counsel for the defendant, that where personal property held under a mortgage is attached, to entitle the mortgagee to maintain an action therefor it is incumbent on him to prove the making a statement of the amount of his claim, and a demand of payment therefor, and a neglect of the officer to comply with the same, agreeably to the provisions of the statute. It does not appear that any such instructions were refused to be given, or that any error occurred in the ruling of the court in this respect. We must presume that proper instructions on this point were given. The bill of exceptions does not purport to give all the instructions, but states the contrary. Aside from that point, which for the reasons just stated is not open here, we perceive no objection to be relied upon or well taken. *Exceptions overruled.*

William H. Reed *vs.* Horace M. West.

If the owner of land, who uses a way over the land of another to reach a highway, makes a conveyance of his land, "with all his privileges to pass and repass to and from the highway;" and all subsequent conveyances of the same premises, for more than twenty years afterwards, refer to this conveyance for a more full description of the premises conveyed, and the successive owners continue during the whole time to use the way without interruption; a right of way is created by prescription over the intermediate land, even if one of such owners was at the same time a tenant in common of that land.

Action of tort for the obstruction of a way. Trial and verdict for the plaintiff in the superior court before *Morton*, J., who made a report of the case, the material part of which is stated in the opinion.

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C. I. Reed, for the defendant, cited *Blossom* v. *Brightman*, 21 Pick. 283; *Dall* v. *Brown*, 5 Cush. 289; *Adam* v. *Briggs Iron Co.* 7 Cush. 361; *De Witt* v. *Harvey*, 4 Gray, 486; *Grant* v. *Chase*, 17 Mass. 443; *Holland* v. *Long*, 7 Gray, 486; *Ward* v. *Bartholomew*, 6 Pick. 409; *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 33; *Sawyer* v. *Kendall*, 10 Cush. 241.

E. H. Bennett, for the plaintiff.

CHAPMAN, J. It appears that the way in question has existed from the plaintiff's close over that of the defendant to the highway, and been used without interruption for more than sixty years. But the decision of the case does not require us to go back beyond February 1827. At that time the executor of Shubael Peck conveyed the plaintiff's close to Noah Bliss, "with all the privileges that said deceased had to pass and repass to and from the highway." Shubael Peck had used the way while he owned the close. In January 1829 Bliss conveyed the land, and in 1856 it came to the plaintiff through several mesne conveyances, all of them, including the one from Bliss, referring to the deed to him for a more full description of the premises conveyed. Whatever rights the several grantors have had in the way have thus been conveyed by their deeds, and have come to the plaintiff, and the use of the way has been continued till the spring of 1859. There has thus been a user continued, under claim of title, long enough to establish a right by prescription.

But when Noah Bliss took his deed of the plaintiff's close, in February 1827, he was the owner of one undivided third part of the defendant's close; and continued to own it till the next May, when he conveyed it. It is contended that this ownership created such a unity of title as to extinguish the right of way. The subsequent deeds and user under them would be a sufficient answer to this position. But it is further to be considered that a unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate in the land *a qua* and in the land *in qua*, equal in duration, quality and all other circumstances of right. *The King* v. *Hermitage*, Carth. 241. Vin. Ab. Extinguishment, C. *Thomas* v. *Thomas*,

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2 Cr., M. & R. 34, and 5 Tyrwh. 804. *Ritger* v. *Parker*, 8 Cush. 145. The title of Bliss to one undivided third part of the defendant's close as tenant in common did not constitute such a unity, for it did not authorize him to set apart any portion of the close for a private way for himself, as if he had been sole owner; but his use of the way during the time of his tenancy in common must have been adverse to his co-tenants.

Judgment on the verdict for the plaintiff.

SAMUEL H. VIALL *vs.* THOMAS CARPENTER.

A trespass committed under a claim of right is not a casual and involuntary trespass, upon tendering sufficient amends for which the trespasser, if afterwards sued, may recover costs under the Rev. Sts. c. 105, § 12.

ACTION OF TORT for trespass on the plaintiff's land. Answer, a disclaimer of all title; that the trespass was casual and involuntary, and was committed in using a way over the land under a belief of right since the date of a former writ by the plaintiff against the defendant, and until the result of that suit informed him that he had no such right; that the defendant before the commencement of this suit tendered to the plaintiff and now brought into court the sum of five dollars for the damages sustained by him by such use of the way; and a denial of any other act of trespass.

At the trial in the superior court, there was evidence of the facts alleged in the answer, and the jury returned a verdict for not more than the sum tendered. The defendant moved for judgment for costs. *Vose*, J. overruled the motion, and the defendant appealed.

C. I. Reed, for the defendant, cited *St.* 1786, *c.* 52, § 2; Rev. Sts. *c.* 105, §§ 11, 12, and commissioners' notes; *Warren* v. *Nichols*, 6 Met. 261.

E. H. Bennett, for the plaintiff, was stopped by the court.

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BIGELOW, C. J. This case does not come within the provisions of Rev. Sts. *c.* 105, § 12, relating to casual and involuntary trespasses on lands. That statute was intended to apply to cases where trespasses had been committed by reason of a casualty, or without the knowledge or assent of the trespasser, as where beasts escape from the land of one person into that of another without any act on the part of their owner. But in the present case the tortious acts were done, not through accident or negligence, or without the exercise of volition by the defendant; they were done designedly and under a claim of right. To call such acts casual and involuntary is a contradiction in terms. Under a similar statute in England, *St.* 21 Jac. 1, *c.* 16, § 5, it has been held that a trespass committed by mistake is not within the terms of the statute, because the act was voluntary. In such case, the entry on the land, being intended, was deemed not to be within the statute, although it might have been made under an erroneous impression as to the right of the tortfeasor in the premises. *Walgrace's case*, Noy, 12. *Basely* v. *Clarkson*, 3 Lev. 37. 1 Man. & Gr. 245 note. If a party enters on land *ex intentione*, the law holds him responsible for all the consequences of his acts, and treats him as a wrongdoer, if he fails to justify his entry. It is only when by a casualty or without design he commits a trespass, that the law seeks to protect him from costs, if he seasonably tenders sufficient amends and disclaims all title to the premises upon which the unlawful entry was made.

Judgment affirmed.

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CYRENUS BLISS *vs.* ABNER D. TRIPP.
ELOISE J. SWASEY *vs.* JAMES WIXON & others.

The prevailing party in a civil action is entitled to tax in his bill of costs travel and a term fee at each term while the case is before an auditor or held under advisement by the court.

APPEALS from taxations of costs in actions at law. In the first case, the trial was had in the court of common pleas at September term 1858, and exceptions entered and argued in this court at October term 1858, and overruled and judgment entered for the plaintiff at November term 1859; the clerk, in taxing the plaintiff's costs in this court, included term fees for each term while the case was under advisement; and his taxation was affirmed on appeal by *Merrick*, J. In the second case, the defendants prevailed, and the clerk, in taxing the costs in the superior court, included travel and term fees during several terms of the court of common pleas while the case was before auditors for examination; and this taxation was affirmed by *Wilkinson*, J. The losing parties alleged exceptions in both cases.

L. Lapham, in support of the exceptions.

B. Sanford & J. C. Blaisdell, contra.

BIGELOW, C. J. The prevailing party in each of these cases, under the provisions of *Sts.* 1852, *c.* 312, § 81; 1855, *c.* 449, § 7; and 1856, *c.* 246, was clearly entitled to a term fee of five dollars and to an allowance for travel for each term during which the action was pending in court. *Richardson* v. *Curtis*, 2 Gray, 497. *Exceptions overruled.*

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Jonathan E. Williams *vs.* Inhabitants of Taunton.

In an action of tort against a town for a penalty imposed by statute for neglecting to choose three fishwardens at the annual meeting, a declaration which sets out the whole statute, and alleges that at the annual meeting in a certain year the town neglected to choose three fishwardens, as by the statute it was required to do, need not further allege that it was the duty of the town to make choice of any particular number of fishwardens, or that the statute is still in full force and unrepealed, nor conclude against the form of the statute.

It is no defence to an action for a penalty imposed by statute upon a town for neglect at its annual meeting to choose certain officers, that the old officers would by law hold over until the election of new ones, or that such officers were in fact chosen at a special meeting, called for the purpose, shortly after the annual one.

Action of tort on *St.* 1855, c. 401, § 9. The declaration recited the whole statute, (the ninth section of which provides that Taunton and certain other towns at their annual meetings in March or April shall each choose three fishwardens; and for a neglect so to choose shall forfeit the sum of one hundred dollars, to the use of any person who shall sue for the same;) and alleged that the annual meeting of the town of Taunton for 1858 was called and held on the 1st, and adjourned to the 27th of March, and then adjourned without day; that at said annual meeting said town neglected to choose three fishwardens, as by said statute said town was required to do, whereby and by force of the statute it became liable to the penalty.

At the trial in the superior court before *Russell*, J., the plaintiff proved by the record of the annual town meeting for the year 1858 that the usual town officers were chosen, but only one fishwarden, and that the meeting was adjourned without day on the 27th of March. The defendants asked the judge to rule that the plaintiff could not recover on the declaration, because it contained no allegation that it was the duty of the town to make choice of a particular number of fishwardens, or that the statute recited in the declaration remained in full force and unrepealed; or that, at the date of the writ, there was any vacancy in the board of fishwardens; and also because the declaration did not conclude *contra formam statuti*. But the judge ruled that the declaration was sufficient.

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The defendants offered a record of the town, showing an election of two fishwardens at a meeting held on the 20th of April 1858, under a warrant dated April 12th, and containing an article for that purpose; and asked the judge to rule that the town might properly, at any time during the months of March or April, choose their fishwardens, and that the choice on the 20th of April was a sufficient choice under the law. But the judge ruled that the choice must be made at the annual meeting in the month of March or April. The verdict was for the plaintiff, and the defendants alleged exceptions.

C. I. Reed, for the defendants.

J. Brown, for the plaintiff.

Merrick, J. By making the entire statute of 1855, *c* 401, a part of the declaration, it was with the other averments sufficiently alleged that it was the duty of the defendants to choose three fishwardens at their annual meeting held in the month of March, because it appears by its provisions that they were thereby expressly required to do so. The enactment of the statute being duly alleged, the court will take notice that it remains in force, and an averment to that effect is unnecessary. 1 Greenl. Ev. § 479. Nor is it essential to aver that the omission or failure of the town to elect fishwardens was contrary to the form of the statute. That is an allegation merely formal, and is not required under the provisions of the practice act. None of the forms in the schedule annexed to that act contains any such averment; and it seems clearly to have been the intention of the legislature that all mere formal allegations, although required by the rules of pleading at common law, should thereafterwards under it be dispensed with, and omitted as useless and immaterial. *St.* 1852, *c.* 312.

The statute regulating the fisheries in Taunton Great River is distinct and express in its provisions, that the several towns therein enumerated shall choose at their respective annual meetings, to be held in the month of March or April in each year, three fishwardens. It cannot therefore be of any consequence, in reference to the question of the liability of any one of those towns to a fine and forfeiture by reason of failure

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or omission to make such choice, that the old or former fish-wardens hold over until others are elected to take their place, or that there is in fact no vacancy in the office. The liability is made to depend exclusively upon the omission or neglect to perform a certain and prescribed duty at or within a particular and specified time, and not at all upon the occurrence of any contingency by which a vacancy in the office may be occasioned.

The authority conferred and the duty imposed upon towns, in relation to the choice of fish wardens, is limited and precise. Three are to be elected by ballot at the annual meeting to be held either in the month of March or the month of April. This right cannot be exercised nor the duty performed at any other time. The choice therefore of fishwardens by the defendants at the special meeting called and held for that purpose on the 20th of April, after the annual meeting had been held and adjourned without day, was wholly unauthorized and ineffectual, and could not relieve them from the consequences resulting from a previous omission or failure to perform the positive duty imposed by law, and to which, under a prescribed penalty for neglect, they are expressly made subject.

Exceptions overruled.

PETER HATHAWAY & another *vs.* JACOB THOMAS & others.

The *St.* of 1856, *c.* 50, empowering the mayor and aldermen of any city, and the selectmen of any town, lying upon the tide waters of the Commonwealth, to license any person to construct fish weirs in such waters within its limits, provided such weirs shall cause no obstruction to navigation nor encroach on the rights of others, does not affect the fisheries in Taunton Great River, regulated by *St.* 1855, *c.* 401.

ACTION OF TORT for the conversion of fishing seines and other property connected therewith. The parties submitted the case to the judgment of the court upon the following facts: The plaintiffs had been licensed by the selectmen of the town of Berkley in accordance with the *St.* of 1856, *c.* 50, (the material

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parts of which are copied in the margin,*) to construct a fish weir in the waters of Taunton Great River at Grassy Island, which is within the ebb and flow of the tide; and had, under this license, established in the river, at the place specified, a structure composed of two stationary seines and a seine movable at one end. The defendants were fishwardens of the towns of Raynham and Middleborough, and, in their official capacity as such, took and carried away the seines and other property composing the structure so erected by the plaintiffs.

C. I. Reed, for the plaintiffs.

E. H. Bennett, for the defendants.

CHAPMAN, J. The fisheries of Taunton Great River have evidently been regarded by the legislature as a subject of great public importance; and the *St.* of 1855, *c.* 401, providing for their regulation, contains a system which must have been elaborated with much care and labor. It had in view their preservation as well as their most convenient and profitable use. Under its provisions, the entire fishery was divided into shares; the shares were the property of the several towns designated, so far as they were valuable to sell by auction; and when sold, they became the private property of the purchasers, to be used in conformity with the regulations of the statute during the season for which they were sold.

It is impossible that the *St.* of 1856, *c.* 50, could have been intended to apply to these fisheries; for it contains a limitation that the acts done under it, by the use of fish weirs, shall not

* SECT. 1. The mayor and aldermen of any city, and the selectmen of the several towns, lying upon the tide waters of this commonwealth, are hereby empowered to authorize in writing any person to construct fish weirs in said waters, within the limits of such city or town, for a term not exceeding five years: provided, said weirs shall cause no obstruction to navigation, nor encroach on the rights of others.

SECT. 2. If any person shall wilfully injure or destroy said weirs, or any part thereof, or shall, without leave of the owners thereof, take from the same any fish found therein, he shall, upon conviction, forfeit and pay to the use of the owners of said weirs a sum not exceeding twenty dollars, to be recovered in any court of competent jurisdiction, and shall moreover be liable to the parties injured for all damages in a civil suit.

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encroach on the rights of others. But the taking of fish by weirs in Taunton River would of necessity encroach on the rights of proprietors under the prior act. The encroachment might be to such an extent as to destroy the whole value of the rights, and the erection of weirs might be carried so far as greatly to diminish, and perhaps to destroy, the fisheries themselves. If the legislature had intended to destroy the system created in the previous year, they would have repealed the act; if they had intended to modify it, they would not have done it by hostile and conflicting legislation, but by carefully guarded provisions. There is another class of fisheries in respect to which the act is appropriate and useful, and we think it was intended to be applied to them only.

Judgment for the defendants.

Charles H. Leonard *vs.* City of New Bedford.

Personal property, liable under the Rev. Sts. *c.* 7, § 10, and *St.* 1839, *c.* 139, § 1, to taxation in the town where the owners hire or occupy manufactories, stores, shops or wharves, is not exonerated from taxation there, because the person owning it is a citizen and inhabitant of and engaged in business in another state where he is liable to pay taxes assessed upon his personal property.

Action of contract to recover back taxes paid under protest for the years 1855 and 1856, submitted to the judgment of the court upon facts agreed, which are stated in the opinion.

J. H. Clifford & W. W. Crapo, for the defendants.

T. D. Eliot, for the plaintiff.

Dewey, J. The plaintiff was the owner of personal property so held and enjoyed as to bring the same directly within the provisions of the Rev. Sts. *c.* 7, § 10, and the subsequent *St.* of 1839, *c.* 139, somewhat extending the former statute, and the two combined clearly subjecting the property to taxation in the town of New Bedford, unless the fact that the plaintiff was a citizen and inhabitant of the city of New York, and there engaged in business as an oil merchant, and was there liable to pay all such

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taxes as by the laws of New York might be assessed upon him, shall be found to exonerate the same from taxation.

It is contended on the part of the plaintiff that these various statutes providing for the assessment and collection of taxes apply only to persons who are inhabitants of this commonwealth, and especially that this must be so in reference to all taxation upon personal property. Looking at the language of the Rev. Sts. *c.* 7, § 2, in which it is declared that "all property, real and personal, of the inhabitants of this state, not exempted by law from taxation, shall be subject to taxation in the manner provided in this chapter," it might seem that our system of taxation contemplated only our own inhabitants.

But this language, it is to be observed, is as applicable to real estate as to personal. No one can doubt but that the real estate situate in this commonwealth, although owned by an inhabitant of another state, is liable to taxation here. Section 30 of *c.* 7, and section 19 of *c.* 8, assume that the law provides for taxing real estate to non-resident owners. All the real estate within the State is properly subject to taxation here. We are aware of a distinction between real and personal estate in respect to the *lex loci rei sitæ*, and that the general rule as to the latter is that it follows the person of the owner, and in most cases in reference to taxes would be taxed at the place of the inhabiting of the owner. But as to goods, wares and merchandise, or any stock in trade, or any stock employed in manufacturing or the mechanical arts, and where the business of selling or manufacturing is carried on in this commonwealth, it has not been thought a violation of any principle of comity to a sister state to tax such goods or stock in the town where they were thus made the subject of sale or manufacture. The extent of this taxation, and the circumstances under which it may take place, must be a subject of statute regulation. This our legislation has done. It is not enough that a non-resident has goods and merchandise in a town in this commonwealth. It is only in case the owners of such goods, or stock employed in manufacture, hire or occupy manufactories, stores, shops or wharves therein.

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The case of the plaintiff, upon the admitted facts, falls within the provisions of *St.* 1839, *c.* 139, and the goods and stock taxed by the defendants were properly the subject of taxation by the city of New Bedford. Unless upon goods and stock thus situated such taxation was required, we should give the preference to trade and manufactures carried on in our towns and cities by traders and manufacturers residing without the Commonwealth. Their property, thus used in business here, has all the protection and all the facilities for making profit thereon that attaches to similar goods, and stock in trade, and business, the property of our inhabitants dwelling here, and yet a tax might be wholly avoided by sending a clerk or agent to transact the business here, the owner continuing to reside out of the limits of the State.

The case of *Blackstone Manuf. Co.* v. *Blackstone*, 13 Gray, 488, clearly indicates the views of this court upon the present question. It was assumed throughout that case by the court, that a citizen and inhabitant of another state would have been taxable for goods and stocks kept and used for similar purposes; and the only question was whether an incorporated company, holding an incorporation under the statute of Rhode Island, with an authority under an act of our legislature to hold real estate in Massachusetts, was subject to such tax, or was to be subject to taxation for its personal property only by a tax upon the shares of its stockholders.

In the case before us, the court are of opinion that the property was legally taxable in the city of New Bedford. The plaintiff will therefore, by the agreement of the parties, be entitled to recover back only the sum of $40.94, being an overtaxation occasioned by an irregularity and error in the apportionment of the whole tax, as between polls and property.

Judgment for the plaintiff accordingly.

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City of New Bedford *vs.* Inhabitants of Middleborough.

In an action brought against a town, a part of which has been made a new town by a statute providing "that the said towns shall hereafter be respectively liable for the support of all persons relieved as paupers, whose settlement was gained by or derived from a residence within their respective limits," to recover for the support of a pauper who had a settlement in the old town, the burden of proof is on the plaintiff to show that such settlement was acquired by a residence within the territory which remains since the division a part of the town now sued.

Action of contract to recover for the support of a family of paupers, alleged to have derived a settlement in Middleborough through Ezra Reynolds. The case was submitted to the superior court on an agreed statement of facts, the substance of which is stated in the opinion. *Vose*, J. ordered judgment for the plaintiffs, and the defendants appealed.

W. W. Crapo, for the plaintiffs, cited *Fitchburg* v. *Winchendon*, 4 Cush. 190; *Boylston* v. *Groton*, 4 Gray, 282; *Oakham* v. *Sutton*, 13 Met. 192; *Kilburn* v. *Bennett*, 3 Met. 199; *Burnham* v. *Allen*, 1 Gray, 496; *Dover* v. *Brighton*, 2 Gray, 482; *Worcester* v. *Wilbraham*, 13 Gray, 586; 1 Greenl. Ev. § 79.

W. H. Wood, for the defendants.

Metcalf, J. By the *St.* of 1853, *c.* 338, dividing the town of Middleborough and incorporating a part of it as a new town, called Lakeville, it is provided that the said towns "shall hereafter be respectively liable for the support of all such persons, who now are relieved, or who may hereafter be relieved, as paupers, whose settlement was gained by or derived from a residence within their respective limits." The plaintiffs therefore, in order to sustain this action, must show that Ezra Reynolds, the grandfather of the pauper, Lorenzo D. Brownell, gained or derived a settlement in Middleborough from a residence within its present limits; and they mistake in supposing that the burden is on the defendants to show that he did not. *Hingham* v. *South Scituate*, 7 Gray, 130, 131.

The facts on which this case is submitted for decision sufficiently show that Ezra Reynolds had a settlement in the old town of Middleborough. The removal of him and his family

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to that town, by its overseers of the poor, from a town which had supported him as a pauper; the payment for that support, and for a like support furnished to him by another town; and the occasional relief given to him, as a pauper, during twenty years afterwards; leave no room for reasonable doubt as to the town of his settlement. These facts, though they would not estop the defendants to deny that his settlement was in old Middleborough, and prove that it was elsewhere, or that he never had one within the State, (*Bridgewater* v. *Dartmouth*, 4 Mass. 273,) must be held to be decisive, until the defendants show that they have heretofore acted in ignorance or under mistake. This they do not attempt to show; but they deny that the other agreed facts are sufficient to prove that the said Reynolds gained or derived a settlement from residence within the present limits of Middleborough. They also contend that those facts furnish sufficient evidence that he gained or derived a settlement, if at all, from a residence within the limits of the present town of Lakeville.

It is unnecessary, and we therefore forbear to express an opinion on the question whether those facts would warrant a jury in finding that Ezra Reynolds resided on the territory that is now within the town of Lakeville. It is sufficient for the decision of this case, that the plaintiffs utterly fail to show, by those facts, that he resided on territory that is now within the town of Middleborough. If, on those facts, a jury would be warranted in finding that the said Ezra was the son of that Ephraim Reynolds who, in 1773, conveyed to six of his other sons his homestead farm, which he had owned for thirty eight years, yet such finding would not avail the plaintiffs; for that farm, as the agreed facts state, was "in that part of Middleborough which is now Lakeville." When an action shall be brought against Lakeville for the support of paupers who derive their settlement from the said Ezra, and be submitted to a jury or to the court, on the facts now before us, we may be required to decide whether those facts will sustain such action.

Judgment for the defendants.

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Stephen Hafford *vs.* City of New Bedford.

A city is not liable for a personal injury occasioned by the negligence of the members, appointed and paid by the city council, of a fire department established by the city council, pursuant to an act of the legislature.

Action of tort. Writ dated August 31st 1858. The declaration alleged "that the said city of New Bedford, as a municipal corporation, and in its capacity as such corporation, being legally authorized and required by law so to do, had purchased and provided divers fire engines, hose carriages and other apparatus connected therewith, for the extinguishment of public fires, and that on the first day of December last past such fire engines, hose carriages and apparatus were owned by said city of New Bedford, and that said city of New Bedford had then and theretofore employed, appointed and qualified divers persons to act as the officers, servants and agents, and to be under the control of said city in the management and use of said fire engines, hose carriages and apparatus whenever any exigency requiring the use of such fire engines, hose carriages and apparatus should occur; that in pursuance of their appointment, employment and qualification as aforesaid, and as they were required to do by virtue of the same, certain of said persons in their said capacity as servants and firemen of said city, whose names are to the plaintiff unknown, when there was a public alarm of fire, and when there was an exigency requiring that said engines, hose carriages and other apparatus should be used and managed by them, on the first day of December last past, were proceeding to use and manage one of said hose carriages in and along a certain common and public highway in said city of New Bedford, known as Purchase Street; that then the plaintiff was walking in and upon said public highway, and was exercising due and reasonable care, caution and diligence in walking as aforesaid; that while so walking, the said persons, being then and there agents, officers and servants appointed, employed and qualified by said city to manage and

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use said hose carriages, and being then in the use and management of said hose carriage, and in the exercise of the service, employment, appointment and qualification as aforesaid, carelessly and negligently drew the said hose carriage against the body of the plaintiff with great violence, so that the plaintiff was thrown down" and greatly injured; and that his injuries "were wholly caused by the negligent and careless exercise of their service and employment by the servants, agents and officers of said city of New Bedford, in the management and use of said hose carriage, and not by any want of due and reasonable care, diligence and caution of the plaintiff, and that the plaintiff is entitled in law to recover of the said city of New Bedford damages and indemnity for said injuries."

The defendant demurred to the declaration, but at October term 1859 was permitted to withdraw the demurrer, and file the following answer:

"And now the defendant comes and admits that on the first day of December 1857 the said city of New Bedford, as a municipal corporation, and in its capacity as such corporation, being legally authorized by law so to do,* had purchased and

* The *St.* of 1852, *c.* 177, entitled "an act for the better organization of the fire department in the city of New Bedford," approved by the governor on the 5th of May 1852, and duly accepted by the city council, consists of the following provisions:

SECT. 1. The city council of the city of New Bedford may establish a fire department for said city, to consist of so many engineers and other officers, and so many enginemen and other members, as the city council by ordinance shall from time to time prescribe; and said city council shall have authority to make such provisions in regard to the time and mode of appointment and the occasion and mode of removal of either such officers or members, to make such requisitions in respect to their qualifications and period of service, to define their office and duties, to fix and pay such compensation for their services, and in general to make such regulations in regard to their conduct and government, and to the management and conduct of fires, and persons attending at fires, subject to the penalties provided for the breach of the city by-laws, as they shall deem expedient: provided, that the appointment of enginemen, hosemen and hook-and-ladder-men shall be made by the mayor and aldermen.

"SECT. 2. The powers and duties mentioned in the preceding section, or any of them, may be exercised and carried into effect by the said council in

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provided divers fire engines, hose carriages and other apparatus connected therewith, for the extinguishment of public fires; and that said city of New Bedford had then and theretofore appointed and qualified divers persons to act as the officers of the fire department of said city, in the management and use of said fire engines, hose carriages and apparatus, whenever any exigency requiring the use of such fire engines, hose carriages and apparatus should occur; and that the said city was the owner of said engines, hose carriages and apparatus as aforesaid, and not otherwise; and the persons so appointed and qualified had then and there the management and control of the same as aforesaid, and not otherwise. But the defendant denies that on the said first day of December there was any such public alarm of fire or any such exigency as required that said engines, hose carriages and apparatus should be used, and further denies that the persons using said hose carriage were the servants of said

any manner which they may prescribe, and through the agency of any persons or any board or boards to whom they may delegate the same.

SECT. 3. The engineers or other officers of the department so appointed as aforesaid shall have the same authority in regard to the prevention and extinguishment of fires, and the performance of the other offices and duties now incumbent upon the firewards, as are now conferred upon firewards by the Revised Statutes, or the special acts relating to the city of New Bedford, now in force. They shall also have authority, in compliance with any ordinance of said city, to make an examination of places where shavings and other combustible materials are collected or deposited, and to require the removal of such materials, or the adoption of suitable safeguards against fire. And said city council are hereby authorized to make suitable ordinances upon this latter subject matter, and annex suitable penalties for the violation thereof.

"SECT. 4. All officers and members of said fire department shall be exempted from military duty, or from serving as jurors or constables, during the time of their employment in said department.

"SECT. 5. The city council aforesaid are hereby authorized, whenever and as often as they shall deem it expedient, to appropriate any sum or sums of money, in the way that may be judged by said council most advisable, for the relief or indemnity of any officer or member of the fire department, who may sustain corporal injury, or contract sickness, in the discharge of his duty as an officer or member of said department.

"SECT. 6. This act shall take effect from and after its acceptance by the city council of said city."

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city, or acting in pursuance of their appointment and qualification as such in the use thereof as is alleged. And the defendant denies that the plaintiff was exercising due and reasonable care, caution and diligence as is alleged. And the defendant is ignorant whether any persons drew said hose carriage against the body of the plaintiff with violence, as is alleged, causing the injuries, as alleged, or the extent and nature of said injuries, if any, so that it can neither admit nor deny the said allegation, but leaves the plaintiff to prove the same; but the defendant denies that said hose carriage was carelessly or negligently used. And the defendant further says, that if any accident occurred to or injury was inflicted upon said plaintiff, it was occasioned by his own negligence and carelessness, and not through any fault of the defendant. And the defendant further answering says, that there is no requirement of law which renders this defendant liable for any act, omission, carelessness or default of the members of the fire department, in the use of said engines, hose carriages and other apparatus connected therewith for the extinguishment of public fires."

A trial was had at November term 1859, before *Bigelow*, J., who made the following report thereof:

"The writ, declaration and answer are to be referred to and make a part of the case. The plaintiff offered evidence tending to show that at the time stated in the declaration, in the evening, he was walking along on the flagged sidewalk on Purchase Street in said city and was using due care and diligence, when there was an alarm of fire, and certain members of the fire department of said city, (appointed and paid for their services, as by the city ordinances, to be referred to, is provided,) upon a fast run, drew a hose reel belonging to the city along upon the sidewalk, and therewith struck the plaintiff with great violence, throwing him down, running over him, and injuring him severely. Evidence was offered tending to show that said members of the fire department as aforesaid at the time when the plaintiff was so struck down as aforesaid had been drawing said hose reel upon the sidewalk from the time they had taken it from the engine house, a distance of some ten or fifteen rods.

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Upon this evidence, the court being of opinion that the action could not be maintained, the case was withdrawn from the jury, to be submitted to the whole court. If the whole court are of opinion that the action cannot be maintained, judgment is to be rendered for the defendants; otherwise, the case is to be sent back for a trial by the jury."

C. I. Reed, for the plaintiff. The enginemen and hosemen of New Bedford are appointed and paid by the city, and it was their duty on an alarm of fire to proceed to the place of the conflagration with their engine and hose carriages, and while so employed they were the servants of the city. *St.* 1852, *c.* 177, §§ 1, 3. New Bedford City Ordinances, *c.* 22, §§ 10, 16, 26. If the members of the fire department drawing the reel when the plaintiff received the injury had been in the employ of an individual or any corporation other than a municipal corporation, the employer would have been liable to this action. *Moore* v. *Fitchburg Railroad*, 4 Gray, 465. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24. The defendants, although a municipal corporation, are liable in this action. *Baker* v. *Boston*, 12 Pick. 195. *Thayer* v. *Boston*, 19 Pick. 515, 516. *Clark* v. *Washington*, 12 Wheat. 40. *Lawrence* v. *Fairhaven*, 5 Gray, 119. *Eastman* v. *Meredith*, 36 N. H. 284. Suppose the driver of a city cart in Boston runs into the carriage of another person under such circumstances as to make his employer, if an individual or private corporation, liable for the injury; would the fact that his employer is a municipal corporation be a defence in an action against the city? Suppose a city or town is erecting a public building and does it so negligently as to injure some person. Towns may acquire real estate and bring real actions. *Windham* v. *Portland*, 4 Mass. 389. *Rehoboth* v. *Hunt*, 1 Pick. 224. Towns are authorized to have an almshouse and a farm connected with it. If they carry on the farm have not they the same liabilities as any farmer, if they trespass on a neighbor's land? Whenever the legislature grant a power or confer a privilege upon a person or corporation, whether municipal or otherwise, that power or privilege is attended with corresponding duties and liabilities, unless the contrary intention is expressed. *Cogs-*

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well v. *Essex Mill Corporation*, 6 Pick. 94. *Lawrence* v. *Fairhaven*, 5 Gray, 119. *St.* 1852, *c.* 177. Municipal corporations have rights not conferred by statute. Parishes are, like towns, *quasi* corporations, yet they have often been held liable to actions of tort not given by statute. *Howard* v. *First Parish in North Bridgewater*, 7 Pick. 138.

J. H. Clifford, (*W. W. Crapo* with him,) for the defendant, cited *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 187; *Mower* v. *Leicester*, 9 Mass. 247; *Sawyer* v. *Northfield*, 7 Cush. 494; *Eastman* v. *Meredith*, 36 N. H. 284; *Bigelow* v. *Randolph*, 14 Gray, 541; *Allen* v. *Taunton*, 19 Pick. 485; *Taylor* v. *Plymouth*, 8 Met. 462; *Coffin* v. *Nantucket*, 5 Cush. 269; *Ruggles* v. *Nantucket*, 11 Cush. 433; *St.* 1852, *c.* 177, § 5.

Bigelow, C. J. Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the city or town has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community, such officer cannot be regarded as a servant or agent, for whose negligence or want of skill in the performance of his duties a town or city can be held liable. The acts proved at the trial fall within this principle, and are not such as to render the defendant liable to an action. The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service; and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty.

Judgment for the defendant.

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Inhabitants of Swansey *vs.* Earl Chace.

It is no defence to an action by a town which has been obliged to pay damages for an injury occasioned by an obstruction in a highway, against the person who placed the obstruction there, that the negligence of the town in not removing the obstruction contributed to the injury.

A town which has voluntarily paid damages for an injury occasioned by an obstruction in the highway, for which the town was liable, may recover the same of a person who placed the obstruction there, if the amount paid was reasonable and the town gave him notice of the claim before payment.

Action of tort to recover thirty dollars paid by the plaintiffs to Edwin Davis for injuries caused by an obstruction consisting of a pile of stones placed by the defendant in a highway, which the plaintiffs were bound to keep in repair.

At the trial in the superior court before *Russell*, J, there was evidence that the plaintiffs were liable for the injury, and, after giving notice to the defendants of the claim, and without having been sued thereon, made a voluntary settlement with Davis and paid him thirty dollars. The surveyor of highways of the district within which the accident occurred testified that he saw the stones in the same place more than two days before the accident.

The defendant asked the judge to rule that if the alleged obstruction was known to the highway surveyor of the district for more than two days previous to the accident, and to other officers of the town, they were negligent in not removing the same, and therefore the plaintiffs could not recover in this action; and also that the plaintiffs could not recover, because they had not been obliged to pay by a suit at law. But the judge refused so to rule, the jury returned a verdict for the plaintiffs for the whole sum claimed, and the defendants alleged exceptions.

E. H. Bennett, for the defendant.

C. I. Reed, for the plaintiffs.

Merrick, J. It is objected that the plaintiffs were not entitled to maintain this action; first, because their negligence contributed to produce the injury for which damages were

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claimed of and paid by them; and secondly, because the damages were paid voluntarily, and not under a judgment recovered against them.

Neither of these objections can be sustained. The first of them must be considered, under the decisions of this court in the cases of *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24, and *Lowell* v. *Short*, 4 Cush. 275, as wholly unfounded. The defendant unlawfully placed a pile of stones within the limits of the highway and near to the travelled road. This obstruction occasioned the injury for which damages were claimed and paid. Although the town were required by law to keep their highway safe and convenient for travellers and all other persons lawfully passing thereon, and became liable for their neglect in this particular to the person who was injured by the obstruction which the defendant had placed in the way, they were under no obligation to him to shield him from the consequences of his own illegal acts. If the person injured had preferred a claim for compensation and indemnity against him, he had no defence under which he could have successfully resisted it. He ought not to be in any more favorable condition merely because the claim in the first instance was made against a party whom he was bound to indemnify and save from loss.

To entitle the plaintiffs to a remedy against one whose unlawful acts had been the means and occasion of subjecting them to a claim for damages which they could not resist, it was not necessary that they should have refused payment until it was enforced against them under a judgment recovered in an action of law. It is sufficient that the claim was one against which they could make no legal defence. They might yield to an unavoidable liability at once, and then have their remedy over against the party responsible to them; just as a grantee in a deed of conveyance of real estate with covenants of warranty may yield to one having a paramount title, or purchase it in, in order to avoid eviction, and then resort to his warrantor to recover compensation for his loss. *Hamilton* v. *Cutts*, 4 Mass. 349. *Sprague* v. *Baker*, 17 Mass. 586. The town therefore had a right, without suit against them, to pay the damages

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demanded, if the amount claimed was reasonable and just, and then look directly to the defendant for indemnity. He however would not be concluded as to the amount of damages by the sum paid by the town, but would have the right to have the amount for which he was liable ascertained and determined by a jury, upon the evidence submitted to them in relation to that question. *Exceptions overruled.*

Martha D. Moore *vs.* Parker Weaver.

By a devise to the testator's daughter, "during the term of her natural life, and after her decease to her children, with liberty to devise the same at her discretion; but if she should decease without any such devise, then my will is, that all her children inherit the same, share and share alike, to them, their heirs and assigns forever;" all the children of the daughter, whether born before or after the death of the testator, take vested remainders upon the death of the daughter, if not immediately upon the death of the testator; defeasible by devise, but not by deed, of the tenant for life; and by virtue of the Rev. Sts. c. 62, § 24, the issue of one of such children who dies after the making of the will, and before the death of the testator, take the parent's share.

Writ of entry to recover an undivided part of land in Swansey, devised to the demandant during widowhood by her late husband Francis Moore.

At the trial in the superior court before *Russell*, J. the following facts were admitted:

Hannah Martin, under whom both parties claimed, died seised of the land in question in September 1816; and by her will, made in June 1812, devised it to her daughter Elizabeth Diman, "during the term of her natural life, and after her decease to her children, with liberty to devise the same at her discretion; but if she should decease without any such bequest or devise, then my will is, that all her children inherit the same, share and share alike, to them, their heirs and assigns forever."

Elizabeth Diman, at the time of her mother's death, was married for the second time. She had by her first marriage one son, Thomas Moore, who died about six months before the testatrix, leaving four children, of whom two at the time

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of the trial still survived; one had died intestate and without issue; and the fourth, Francis Moore, the demandant's husband and devisee, had died in 1851. By her second husband, who died in 1822, Elizabeth had six other children, of whom five were living at the time of the trial, and one had died intestate and without issue in 1822, before his father. Elizabeth died in February 1855, intestate, having in 1826, together with her five surviving children, conveyed the land in question to Charles Collins, whose title the tenant had.

The tenant requested the judge to instruct the jury as follows: "That the will of Hannah Martin gave to Elizabeth Diman the lots of land in question in fee simple: That the power to Elizabeth, contained in the will of Hannah Martin, was well executed by her deed to Charles Collins: That if Elizabeth had only a life estate, the remainder to her children did not vest until the death of the testatrix or of the tenant for life; that the remainder was only to go to the class of children of Elizabeth at the time of her death, or of the death of the testatrix; and that Thomas Moore, from whom the demandant claimed title, having died before either of these dates, the demandant was not entitled to recover: That the Revised Statutes, *c.* 62, § 24, do not apply to this case, and give the representatives of a deceased child of said Elizabeth, who died before either of said dates, a right to the share of their ancestor, had he lived: That the remainder, if any, vested in a class of persons, and that those only who comprised that class at the death of the testatrix could take."

But the judge instructed the jury, "that upon the facts shown the demandant was entitled to recover one undivided twenty-first part of the lots in question; and, against the tenant's objection, that she could recover in this form of action." The jury returned a verdict for the demandant accordingly, and the tenant alleged exceptions.

After the verdict was rendered the parties agreed that the deceased child of Elizabeth by her second marriage died after his father, and that if the demandant could recover at all the verdict should be amended accordingly by adding one undivided one-hundred-and-forty-seventh part.

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J. Brown, for the tenant.

E. H. Bennett, for the demandant.

BIGELOW, C. J. By the will of Hannah Martin, her daughter took a life estate only in the real estate of which the testatrix died seised, and the remainder vested in fee simple in the daughter's children. The devise comes within the provisions of the Rev. Sts. *c.* 59, § 9. *Richardson* v. *Wheatland*, 7 Met. 169. *Weld* v. *Williams*, 13 Met. 486. The power conferred on the tenant for life to dispose of the estate by will did not affect the nature of the estate which passed to her children. This power not having been exercised, their estate took effect absolutely *secundum formam doni*. It was defeasible only on an event which did not take place. The case does not raise the question whether the remainder vested at the death of the testatrix, or was contingent until the death of the tenant for life. If the devise had been to "the heirs" of the first taker, its construction would have been open to grave doubt. *Richardson* v. *Wheatland*, *ubi supra*. But by the gift of the remainder to the children of her daughter, with a distinct declaration that "all her children" are to take, a clear intent is manifested to create a vested remainder in those born after as well as before her death. To carry into effect such intent the remainder must be held to be capable of opening to admit afterborn children. *Bowers* v. *Porter*, 4 Pick. 198. By virtue of the Rev. Sts. *c.* 62, § 24, the issue of the daughter's son by her first marriage, who died before the testatrix, took his share. Our opinion of the construction and effect of this devise accords with that given to it by the supreme court of Rhode Island in *Moore* v. *Dimond*, 5 R. I. 121. *Exceptions overruled.*

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Dean Jones *vs.* Jonathan Crane & others.

Under the Rev. Sts. *c.* 59, § 11, and *c.* 62, § 24, a residuary devise of real estate to "my nephew A. and my niece B. and their heirs and assigns forever" is of an estate in common and not in joint tenancy; and if one of the devisees dies before the testator, his or her moiety descends to the testator's heirs at law.

Petition for partition of real estate included in this devise in the will of Susannah Jones: "All the residue of my estate of which I shall die seised, both real and personal, I give and bequeath unto my nephew James M. Dean, and my niece Fanny Crane, to hold to them and their heirs and assigns forever." After the making of the will, and before the death of the testatrix, James M. Dean died, without issue. The heirs at law of the testatrix were her brother the petitioner, Fanny Crane, and Rachel Dean a sister of Fanny Crane. The parties submitted the case above stated to the judgment of the court.

J. E. Sanford, (*B. Sanford* with him,) for the petitioner.

C. I. Reed, for Fanny Crane, cited *Prescott* v. *Prescott*, 7 Met. 146; *Van Kleeck* v. *Dutch Church*, 20 Wend. 499; 4 Kent Com. (6th ed.) 541–543; *Bagwell* v. *Dry*, 1 P. W. 700; *Webster* v. *Webster*, 2 P. W. 347; Rev. Sts. *c.* 59, §§ 10, 11; *c.* 62, § 3; *Earle* v. *Wood*, 8 Cush. 447.

Metcalf, J. The petitioner is clearly entitled to partition of the real estate which was devised by Susannah Jones to James M. Dean and Fanny Crane. That devise was to them as tenants in common; it not manifestly appearing, from its tenor, that it was intended to create an estate in joint tenancy. Rev. Sts. *c.* 59, § 11. By reason of the death of James M. Dean, in the lifetime of the devisor, the devise to him of an undivided moiety lapsed, became intestate property, and descended to the devisor's heirs at law, to wit, to her brother, Dean Jones, the petitioner, and to Rachel Dean and Fanny Crane, children of her deceased sister; these three being her only heirs at law. Rev. Sts. *c.* 61, § 1, and *c.* 62, § 24. *Hooper* v. *Hooper*, 9 Cush. 122.

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The petition correctly states the fractional parts of the estate to which each of the parties to the petition is entitled. Fanny Crane took, by the devise, one half of the whole that was devised to her and to James M. Dean in common, and took, by descent, one fourth of the other half, viz. five eighths of the whole; Rachel Dean took, by descent, one fourth of that other half, viz. one eighth of the whole; and the petitioner took, by descent, the other two eighths of that half, viz. one fourth of the whole. *Judgment for partition.*

Charles M. Guild *vs.* Hervey M. Richards.

Breach of a condition in a deed does not revest the land in the grantor without entry.

In this commonwealth, as at common law, the grantor of an estate upon condition cannot convey his right of entry for breach of condition to a stranger.

Turning cattle upon land while unimproved and unenclosed, and using the land while in that state as a means of access to adjoining land, is not such an entry for breach of condition as will revest the estate in the grantor.

A parcel of land was conveyed "in consideration of love and good will for and towards the Methodist Church and Society of A." to an individual, "in trust for the use and benefit of said church and society, their heirs and assigns, in trust for the use of the members of the Methodist Episcopal Church usually attending religious worship in A. under the conditions and restrictions hereinafter written," *habendum* "in trust as aforesaid forever, upon the following conditions and restrictions: that the same shall be and remain forever under the control and direction of such members of said church as are embraced with the feelings and opinions of the antislavery society for the immediate abolition of slavery in the United States; and further, that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building, or take any control or direction of the same." *Held*, that this deed created an estate upon condition; and that the union of this church with an annual conference subordinate to the general conference of the Methodist Episcopal Church, and receiving a minister appointed by the bishop thereof, and conveying the land to trustees nominated by such minister, according to the usage of that church, were a breach of the condition.

A grantor who has once waived a right of entry for breach of condition cannot afterwards take advantage of it.

Action of tort for breaking and entering the plaintiff's close in North Attleborough, and carrying away stones and grass. Writ dated August 11th 1857. Answer, soil and freehold in the defendant.

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At the trial in the court of common pleas in Bristol at September term 1858, before *Briggs*, J., the plaintiff put in evidence a deed to himself from Samuel Guild, the former owner of the premises, dated February 3d 1853; and there rested his case.

The defendant gave in evidence a deed, dated September 25th 1839, from Samuel Guild to Harrison Holmes, in trust for the Methodist Church and Society of North Attleborough, the material parts of which were as follows:

"Know all men by these presents, that Samuel Guild of Attleborough, County of Bristol and Commonwealth of Massachusetts, yeoman, in consideration of love and good will for and towards the Methodist Church and Society of North Attleborough, which love and good will I do hereby acknowledge, do hereby give, grant and convey unto Harrison Holmes, of the town, county and commonwealth aforesaid, trader, in trust for the use and benefit of said church and society, their heirs and assigns, in trust for the use of the members of the Methodist Episcopal Church usually attending religious worship in that part of the town of Attleborough in the county of Bristol, called and known by the name of North Attleborough, under the conditions and restrictions hereafter written, to wit, a certain lot of land situated in said North Attleborough," described by metes and bounds: "To have and to hold the aforegranted premises to the said Harrison Holmes, in trust as aforesaid forever, upon the following conditions and restrictions: Whereas a building is to be erected or placed upon said premises, to be used by the members of said church as a place of worship, a part of which building is also to be made into a tenement, to be occupied as a family residence, and whereas many of the members of said church are fully persuaded in the practicability of the immediate abolition of slavery in the United States of America, and hold it a solemn duty to do all that lies in their power lawfully to promote said object, and whereas said premises and building being principally purchased and procured by the antislavery members of said church, the same are to be wholly under their control and direction, and in no case what-

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ever are any such members of said church as are not believers in and practisers of the doctrines of antislavery to take any part or have any power of controlling the use of said premises and building or in any way disposing of the same, but the same shall be and remain forever under the control and direction of such members of said church as are embraced with the feelings and opinions of the Antislavery Society for the immediate abolition of slavery in the United States, and further that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building or take any control or direction of the same, and that said trustees shall not permit any other than antislavery members of the church first named to direct them in the use and disposition of said land and building, and said trustees shall at all times be under their control and direction in the appropriation and disposition of said land and building, and conform to such control and direction. And I do covenant with the said grantees, their heirs and assigns, that I am lawfully seised of said premises; that the same are free from all incumbrances; that I have good right to give and convey the same as aforesaid; and that I will warrant and defend said premises to the grantees, their heirs and assigns, against the lawful claims and demands of all persons, so long as the same shall be used and improved upon the conditions and under the restrictions above written and no longer."

The defendant also gave in evidence a deed, dated October 5th 1840, from Harrison Holmes, "by virtue of the unanimous vote of the Methodist Episcopal Church in that part of said Attleborough called North Attleborough, for that purpose duly passed and recorded upon their book of church records, and in consideration of one dollar paid by said Episcopal Church," conveying the land to the grantor and six others, "trustees of said church, duly chosen, and to their successors in said office and their assigns, in trust for the use of the members of said church usually attending religious worship in said North Attleborough, upon the conditions and under the restrictions hereafter written;" *habendum* "in trust as aforesaid forever, upon

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and under the following conditions and restrictions: Whereas a building has been erected and placed upon said premises, to be used by the members of said church as a place of worship, a part of which building is also made into a tenement to be occupied as a family residence, the trustees aforesaid are to hold said premises, with all the privileges and appurtenances thereunto belonging, for the use of said church as aforesaid, subject to the rules and discipline of the Methodist Episcopal Church in the United States of America, and such as are made for the government of the same: Provided however that if at any time hereafter the general conference of the Methodist Episcopal Church in the United States should be divided, none but the members of said church in said North Attleborough who are believers in the doctrines of antislavery shall have the control of the aforesaid premises, or to have any vote in the disposition of the same: Provided also that the said trustees may at any time at their discretion open said building to persons who may from time to time call on them, or a majority of them, wishing to deliver lecture or lectures upon the doctrines and principles of antislavery in the United States, when said building is not otherwise engaged or in use by said church: Provided also that the said trustees shall have the care of said premises under the control and direction of said church, conforming in all things to said rules and discipline, and such as are made by the Methodist Episcopal Church in the United States for the general government of said church."

It appeared that the grantees in this deed, including Holmes, were the sole trustees of that church from the date of this deed to the dissolution of the church and society in 1844; that these trustees before the date of this deed incurred a debt of about one thousand dollars in building their meeting-house on the land, and after that date gave their note for that amount, secured by a mortgage of the meeting-house and land, to Joseph Smith; and on the 17th of August 1843, in discharge of that debt, all the trustees except Holmes executed a quitclaim deed of the meeting-house and land to Smith, who entered upon the land, and by himself and his lessee (who during the

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last year was the defendant) remained in quiet occupation of the premises until the 10th of January 1849, when he conveyed them to the defendant, who converted the meeting-house into a hall for lectures and dancing, and in 1855 removed it from the land, and the building was never afterwards used as a meeting-house by any church or society.

The plaintiff proved that the general conference of the Methodist Episcopal Church, as early as the 5th of October 1840, upon the application of the church in North Attleborough, sent to it a minister, who, according to the usage and discipline of that church, appointed Holmes and the other six grantees named in the deed of that date as trustees of the church and society. Holmes testified that, before borrowing the money of Smith, the church put itself under the control and direction of the general conference, according to the discipline of the Methodist Episcopal Church; and that the trustees, when about giving the mortgage, applied to Guild to give a new deed without the condition that it should not be under the direction of the conference, but Guild declined. The plaintiff contended that these facts proved a breach of the condition of the deed from Guild to Holmes, "that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building or take any control or direction of the same"; and that, upon proper entry by Guild for such breach of condition, the estate would revest in him. And the judge so ruled.

The plaintiff further contended that the extinction of the church and society in 1844 and the conversion of the property to other purposes were a breach of condition, which on proper entry would revest the estate in Guild. And the judge so ruled.

It was proved that Guild occasionally turned his cattle upon the land; that the land on one side adjoined the road, and was entirely unfenced, so that cattle and carriages could pass in and out without obstruction; and that at places on other sides the fence was broken down, so that cattle could pass in and out from one lot to another without obstruction. It did not appear that Guild ever did any other act upon the land to constitute an entry for the alleged breach of condition, or ever

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gave any notice to Smith or the defendant that he had entered or should enter for breach of any condition in his deed.

Evidence was offered tending to show that Guild and the defendant conferred together occasionally before the 10th of January 1849 about buying the land from Smith to own as tenants at common, at which times Guild set up no title or right on the land; but the negotiations were broken off because they could not agree about the extent of repairs and improvements which should be made after so purchasing.

The defendant contended that if there had been such a breach of condition as entitled Guild to enter upon the premises and repossess himself of his former estate, Guild had never made a sufficient entry to revest the land in him, and that not having so entered he had no interest or estate in the land, which he could convey to the plaintiff. But the judge instructed the jury that the facts proved were sufficient to warrant them in finding that Guild had made a sufficient entry for the breach of condition to revest the property in him; and that if he had not done so, his deed to the plaintiff transferred to the latter the right to enter, so that he might enter and thereby vest the estate in him as Guild might have done.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued in October 1859, and decided in June 1860.

E. Ames, for the defendant. 1. Conditions are not favored in law, and are to be construed strictly. The words of the habendum in the deed from Guild to Holmes did not create a condition; because such does not appear by the whole deed to have been the intention of the parties; because they are uncertain; and because the conditions sought to be established are repugnant to the grant. 4 Kent Com. (6th ed.) 129–132. *Simonds* v. *Simonds*, 3 Met. 562. *Canal Bridge* v. *Methodist Religious Society*, 13 Met. 349. *Merrifield* v. *Cobleigh*, 4 Cush. 184. *Hadley* v. *Hadley Manuf. Co.* 4 Gray, 140. *Nourse* v. *Merriam*, 8 Cush. 11. *Newkerk* v. *Newkerk*, 2 Caines, 352. *Baldwin* v. *Atwood*, 23 Conn. 367. The words after the last covenant qualify that covenant only. *Estabrook* v. *Smith*, 6 Gray, 572.

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2. The submission of the church to the control and direction of the general conference, the receiving of a preacher from that conference, the giving of a mortgage by his advice, and the extinction of the church and society, did not constitute a breach of condition.

3. Any right of entry for breach of condition was waived by the delay to enforce it, and by the negotiations between Guild and Smith. Shep. Touchst. 158. 4 Kent Com. 129. *Goodright* v. *Davids*, Cowp. 805. *Doe* v. *Eykins*, 1 Car. & P. 154. *Ludlow* v. *New York & Harlem Railroad*, 12 Barb. 440. *Underhill* v. *Saratoga & Washington Railroad*, 20 Barb. 467.

4. An estate upon condition can be terminated only by an entry of the grantor or his heirs for breach of condition. Jackson on Real Actions, 2. Stearns on Real Actions, 24. 4 Kent. Com. 127. 1 Saund. 319 note. Rev. Sts. *c.* 59, § 7, & commissioners' notes. *Austin* v. *Cambridgeport Parish*, 21 Pick. 224. *Tallman* v. *Snow*, 35 Maine, 342. *De Peyster* v. *Michael*, 2 Seld. 506, 507. *Ludlow* v. *New York & Harlem Railroad*, 12 Barb. 440. *Underhill* v. *Saratoga & Washington Railroad*, 20 Barb. 467.

5. No entry for breach of condition was proved. The intent of such an entry must appear. Stearns on Real Actions, 20, 43, 45, 46. *Robison* v. *Swett*, 3 Greenl. 324. The occasional turning of cattle upon an unfenced lot was too equivocal. *Kilburn* v. *Adams*, 7 Met. 33.

E. H. Bennett, for the plaintiff. 1. The words of the deed created an estate upon condition. *Hayden* v. *Stoughton*, 5 Pick. 528. *Gray* v. *Blanchard*, 8 Pick. 283. *Brigham* v. *Shattuck*, 10 Pick. 306. *Lawrence* v. *Gifford*, 17 Pick. 366. *Austin* v. *Cambridgeport Parish*, 21 Pick. 215. *Hapgood* v. *Houghton*, 22 Pick. 480.

2. The condition was broken by the exercise of control and direction by the general conference over the premises; and by the dissolution of the church and society, the removal of the meeting-house, and its devotion to other purposes. *Austin* v. *Cambridgeport Parish*, 21 Pick. 215. *Sperry* v. *Pond*, 5 Ohio, 387. *Grissom* v. *Hill*, 17 Ark. 483.

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3. The grantor's silence and not entering immediately upon the first breach of condition were no waiver of the forfeiture. *Jackson* v. *Crysler*, 1 Johns. Cas. 125. *Gray* v. *Blanchard*, 8 Pick. 283. *Lawrence* v. *Gifford*, 17 Pick. 366. The negotiations between Guild and Smith amounted to nothing.

4. If there was a breach of the condition before the conveyance to the plaintiff in 1853, no actual entry by the original grantor was necessary in order to enable him to convey his interest in the premises. An entry was not always necessary at common law; a mere claim was often sufficient to avoid an estate granted upon condition. 2 Bl. Com. 154. Co. Lit. 214 *a*. Bac. Ab. Condition, O. Conveying the property to the plaintiff in 1853, long after breach of condition, was making a claim to it, an act denying the original grantee's title. The reasons which made such entry necessary at common law, in order to give livery of seisin, and to prevent oppression by pretended titles, do not now exist. *Cessante ratione, cessat ipsa lex.* But whatever was the old common law on this point, it was changed by St. 32 H. 8, *c.* 34, allowing the assignee of a reversion the same right to take possession for condition broken as the assignor had. 4 Kent Com. 122, 123. *Wright* v. *Burroughes*, 3 C. B. 685. Whatever may be the English law on this subject, in this commonwealth a person may convey by deed "any estate or interest in lands." Rev. Sts. *c.* 59, § 1. Guild's interest in this estate could have been devised under St. 1783, *c.* 24, § 1, even before breach of condition. *Hayden* v. *Stoughton*, 5 Pick. 528. *Austin* v. *Cambridgeport Parish*, 21 Pick. 215. Although by that statute a person could devise only those lands of which he was "lawfully seised," yet, under the case last cited, Guild could have maintained a writ of entry for breach of this condition, on the day of his conveyance to the plaintiff. He therefore had an interest in the estate, which he could convey by deed.

5. If an entry by Guild was necessary, there was sufficient evidence in the case to warrant a jury in finding it.

Bigelow, J. The plaintiff seeks to maintain trespass in this case, on the ground that the title to the close is in him, and,

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as possession follows the right of property or title, that he may recover against the defendant as a tortfeasor for entering on the premises and removing therefrom the crops and other property. The case for the plaintiff therefore turns wholly on the question whether he shows any valid title to the land in question.

In support of this title he relies on the deed to him from Samuel Guild of February 3d 1853. It appears that the premises originally belonged in fee to said Samuel Guild, and that he conveyed them, by a deed bearing date September 25th 1839, to Harrison Holmes. The plaintiff contends that this deed was upon a condition subsequent; that this condition, long prior to the conveyance to him by Samuel Guild, was broken by the grantees or their assigns; and that thereby the estate reverted to, and was revested in, the original grantor, by whom the condition was created, and was duly conveyed to him by the deed of Samuel Guild first above mentioned. Assuming that the first grant of the estate by Guild was on a condition subsequent, which has been broken, we think it very clear that the deed under which the plaintiff claims the estate is invalid, because Samuel Guild, his grantor, had never entered for a breach of the condition contained in the original deed from him to Holmes, and had no title which he could convey at the time of his grant to the plaintiff.

It is of the essence of an estate on condition, that the right to enter for a breach of the condition is reserved to the grantor and his heirs. It cannot be reserved to strangers. If on the breach of the condition the estate is by the original terms of the conveyance granted over to a third person, it creates an estate upon a conditional limitation and not on a condition. *Brattle Square Church* v. *Grant*, 3 Gray, 146 – 149. An estate on condition is not absolutely terminated by a breach. The law permits it to continue until an entry or claim by the grantor or his heirs. All that remains in the grantor of an estate on condition is a right of entry for breach, which is somtimes called a possibility of reverter. This right or possibility, although it may be released to the person holding the conditional estate, so as to vest the absolute title in him, cannot be con-

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veyed to a stranger or third person. A mere right of entry could not be conveyed at common law. It would be contrary to the ancient well settled rule that "nothing in action, entry or re-entry, can be granted over." Co. Lit. 214 *a*. It contravenes the policy of the law, which does not permit the buying or selling of pretended or disputed titles, or rights to real estate, which rest wholly in action. Co. Lit. 214, 215 *a*. 2 Cruise Dig. tit. 13, *c*. 1, § 15. 1 Preston on Estates, 115. Stearns on Real Actions, 24, 33. *Bangor* v. *Warren*, 34 Maine, 324. *De-Peyster* v. *Michael*, 2 Seld. 506, 507. *Nicoll* v. *New York & Erie Railroad*, 2 Kern. 121. It is on this ground, that a disseisor cannot convey his right of entry to a third person, so as to enable the latter to maintain an action. Until he has re-entered and thereby gained his seisin, he cannot convey his right, although under the Rev. Sts. *c*. 101, § 4, he might maintain an action in his own name to recover the estate without any actual entry under his title. Such being the rule in case of disseisin, where the claim is in favor of the purchaser of the right of entry of the real owner as against a disseisor; *a fortiori*, it is applicable to a case like the present, where the claim is made by the purchaser of a right of entry to forfeit an estate for breach of condition against those holding the estate under a grant originally valid. Such forfeitures are not favored by the law. Nor is any change of the rule of the common law, which did not permit the alienation of mere rights of entry, made by the Rev. Sts. *c*. 59, § 1. That authorizes "conveyances of lands or of any estate or interest therein" to be made by deed, but it requires them to be executed by persons "having authority to convey the same." This in terms excludes the conveyance of mere rights of entry, the owners of which have no legal authority to alienate them. *Tallman* v. *Snow*, 35 Maine, 345. The St. of 32 H. 8, *c*. 34, cited by the plaintiff, applied only to estates in reversion strictly speaking, such as that of a lessor, and not to the right of entry or possibility of reverter remaining in the grantor or his heirs in the case of a grant of an estate on condition. Co. Lit. 215 *a*. 4 Kent Com. 123. 2 Cruise Dig. tit. 13, *c*. 2, § 51.

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It follows from this view of the rule of law applicable to the alienation of rights of entry, that it was necessary for the plaintiff to prove an actual entry by his grantor, Samuel Guild, for a breach of the condition. Such entry was necessary in order to revest the estate, and give to the grantor a lawful seisin of the estate, which he could convey by deed, in the place of a right of entry which he could not aliene. But the evidence offered by the plaintiff fell far short of proving any entry on the land by the grantor for the purpose of terminating the estate of those who held it under his original grant to Holmes. The premises were unfenced, so that they were accessible from the highway, and also from other adjoining land of Samuel Guild. Under such circumstances, the fact that he occasionally turned his cattle upon the land in question was entirely consistent with an intention not to enter for a breach of condition. The act, at most, was equivocal and indecisive. The premises were unimproved and unenclosed, and were so situated as to be conveniently used by Guild to obtain a ready access to his adjacent land. This he might well have done, not intending to assert any title to the *locus*. The plaintiff therefore failed to sustain the burden of proof, which rested on him, of showing by clear and decisive evidence an entry by the grantor for a breach of condition before he made his deed to the plaintiff.

Exceptions sustained.

Upon a second trial in the superior court at September term 1860, before *Wilkinson*, J., the plaintiff introduced evidence tending to prove that the church and society mentioned in the deed of 1839 from Guild to Holmes was a new and independent church and society, having no connection with any conference of the Methodist Episcopal Church or any bishop thereof; that some Methodist societies called themselves Episcopal, though not properly such; that no persons or body of persons are members of the Methodist Episcopal Church, unless as a body or as a church connected with the annual conference and that with the general conference; and that Guild himself was never a member of that church, but of the Baptist Church.

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The plaintiff further offered evidence that the church and society, after receiving the deed from Guild, proceeded to erect a house of worship on the premises, which was dedicated in the summer of 1840; that about that time the church and society became thoroughly united with the conference of the Methodist Episcopal Church, according to the rules and discipline of that denomination, by applying to the conference to send them a preacher, and by the bishop's appointing and sending a minister of that church, in connection with the annual conference, and by his taking charge of said church and society; that by the usages and discipline of the Methodist Episcopal Church the bishop has power to fix the appointment of preachers over the societies that are in connection with the general conference, and to remove them; and that the powers of the bishop are conferred by the discipline, which is enacted or established by the general conference, a body which meets once in four years, composed of delegates from the various annual conferences, and which makes regulations and discipline governing the church, and defining the power of the bishops, preachers in charge, and trustees of the societies in connection with them; that the preacher in charge has absolute power to appoint a board of trustees, without the action or ratification of the church and society over which he is appointed; and the trustees so appointed have power to mortgage, or, upon proper notice to the preacher in charge, to sell, the house and land vested in them as such trustees, to secure or pay a debt due for erecting or repairing their house of worship; that the general conference has no right or title to the meeting-houses or the land on which they stand, and has no control or direction of them, except by establishing the discipline under the regulations of which the bishop, at the annual conferences, appoints preachers who occupy the pulpit and appoint the trustees to whom the title to the land and meeting house is conveyed, and who have the control and direction thereof.

The plaintiff offered further testimony, tending to prove that the minister sent by the bishop, immediately upon arriving at

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Attleborough, appointed seven trustees for the church and society, according to the usages and discipline of the Methodist Episcopal Church, and organized the society in connection with the Providence Annual Conference, and that the pulpit was occupied by him for about two years, and afterwards, until the conveyance of the premises in 1843, by successive ministers appointed in like manner. The plaintiff also introduced evidence similar to that introduced at the first trial, in relation to the conveyance of the land, the extinction of the church and society, and the removal of the meeting-house and its conversion to other uses.

The plaintiff also offered evidence tending to show that "very soon after the appointment of the trustees, an interview took place between Holmes and Guild, the grantor, in which Guild said to Holmes that the conditions of his deed had been broken by joining the conference and receiving a preacher from them, and that the land reverted back to him; that he gave the land, not that there might be a minister from the conference, but he wanted a free church; that Holmes applied to Guild for a new deed without any condition, and that Guild said he would not give a new deed, and that he had given all the deed he should give."

The plaintiff contended that by the disbanding of the church and society, and the use of the meeting house for a public hall for lectures and dancing, the abandonment of the house altogether as a place of religious worship, and the final removal of the same from the premises, no other place of worship having since been erected there, constituted a breach of the conditions in the deed, sufficient to entitle Guild to enter and revest himself of his former estate. But the judge ruled otherwise.

The plaintiff contended that the application of the church or society to the conference for a preacher, the appointment of a preacher, and the sending of the preacher to the society or church to preach in that church, his preaching there, and appointment of the seven trustees, the conveyance by Holmes to those trustees, and the subsequent conveyances, and the power which exists to supply the pulpit in the meeting-house, and

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other matters hereinbefore shown, constituted a breach of the conditions in the deed, sufficient to entitle Guild to enter and revest himself as of his former estate. But the judge ruled otherwise, and directed a verdict for the defendant.

The plaintiff alleged exceptions, which were argued at the present term by the same counsel.

Bigelow, C. J. There can be no doubt as to the intent of the grantor in the original deed, by which the estate in controversy was conveyed in trust for the use and benefit of the Methodist Church and Society in North Attleborough. His leading purpose was to secure the premises, so that they should always remain subject to the control and direction of the anti-slavery members of that church, who were favorable to the immediate abolition of slavery in the United States. To carry out this purpose, the conveyance is expressly made upon certain "conditions and restrictions;" and these words are inserted not only in the granting part of the deed, but also in the habendum. To language so direct and explicit, it is impossible to give any interpretation other than that which results from the plain and obvious meaning of the words. While it is true that conditions subsequent are not favored in law, and words of doubtful meaning are so construed as to create an absolute estate, nevertheless this rule of interpretation has no application where the intent of the grantor is manifest, and is expressed in apt and unequivocal terms. We know of no case where land has been granted for a special use, and the grant expressly made subject to the condition that it should be appropriated and used for the designated purpose, in which it has been held that such a conveyance vests in the grantee any greater interest than an estate on condition. The words *sub conditione* are the precise and technical terms by which an estate on condition is created, and there must be some very strong language in a grant to control and overcome the force and effect of these words. In such cases, to use the quaint language of the books, "without any more saying, the feoffee hath an estate upon condition." In the deed under which the defendant claims title to the premises in controversy, there is

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nothing to control the legal effect of the conveyance on condition. On the contrary, the ordinary interpretation of these words best subserves the manifest interest of the grantor, which was to convey the premises for a specific and designated use, and to prevent their being occupied for any other purpose.

It was urged, on behalf of the defendant, that the grant having been made on certain "conditions and restrictions," the word "conditions" is not to have its usual interpretation, but is to be construed as being nearly synonymous with the word with which it is connected, and as meaning regulations or directions only. But the rule that the coupling of words together indicates that they are to be understood in the same sense cannot be properly applied to the construction of an instrument, so as to make a word of an uncertain and indefinite meaning, used inartificially as applied to the subject matter, control the legal interpretation of a word which is apt and technical, and has a well understood and settled signification in the law. The more reasonable application of the rule is that the technical word should control a word of an unsettled meaning, if force and effect cannot be properly given to both.

The only other question raised at the trial was as to the sufficiency of the evidence offered by the plaintiff to prove a breach of the condition. Upon this point we can entertain no doubt. One of the conditions distinctly expressed in the deed is, "that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building or take any control or direction of the same." This condition was doubtless framed with reference to the established and recognized rules and discipline of the Methodist Episcopal Church in the United States, which were proved at the trial; and was intended to prevent the estate granted from being under the control and direction of a board of trustees appointed by the preacher, who, according to such rules and discipline, might be designated and sent to the church or society by the bishop. In this way, the grantor sought to subserve his main purpose of keeping the disposition and control of the estate in the hands of the antislavery members of the

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church. The evidence offered at the trial clearly proved a breach of this condition. The appointment of a preacher by the general conference, and the designation by him of certain persons as trustees, who, under the rules and discipline, had a right to exercise a certain control over the premises, operated to give to the conference the very direction and control referred to in the condition, which was contemplated by the grantor, and which he intended by this condition to restrain and prohibit.

Exceptions sustained.

A third trial was had in the superior court at September term 1861, before *Rockwell*, J., who allowed a bill of exceptions, setting forth the introduction of substantially the same evidence as at the former trials, and the material parts of the rest of which were as follows:

It was admitted by the plaintiff "that there never had been any members of said church in North Attleborough, except such as were embraced with the feelings and opinions of the Antislavery Society, and were antislavery in sentiment;" and "that any condition to defeat the deed upon any such ground merely as that members of this church were other than antislavery should be considered as stricken from the deed, as if the same had never existed."

The defendant contended that there was one condition only in the deed of Guild to Holmes, namely, "that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building or take any control or direction of the same;" and conceded that it was proved that the church and society had applied to the conference for a preacher, and had received the preacher appointed by the bishop at the conference, and had connected themselves with the general conference and thereby subjected themselves to the discipline and rules of the conference; and that upon the conveyance by Holmes in 1840 to the trustees appointed by such preacher, there was a breach of the condition, so that Guild might then have re-entered and revested himself as of his former estate, had he seen fit to do so; but contended

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that it had been waived by the omission of Guild to enter and revest himself as of his former estate, and by his inducing and causing Smith to accept a mortgage and a quitclaim deed of the land and to discharge the personal liability of the trustees, and by Guild's encouraging the defendant to purchase of Smith and to go on and make great and expensive improvements and repairs after said admitted breach without notifying either Smith or the defendant of Guild's claim; and introduced evidence tending to show such a waiver before the defendant purchased and repaired and altered the house.

The plaintiff contended that there was a second condition in the deed, namely, that the premises "shall be and remain forever under the control and direction of such members of said church as are embraced with the feelings and opinions of the Antislavery Society for the immediate abolition of slavery in the United States," and that this was broken after the defendant went into the occupation of the meeting house in 1848; and that if there was a waiver of the breach of the first condition, yet, upon a subsequent breach of the second condition, Guild, by making proper entry thereon, might revest himself of his former estate in the land. And the judge so held; and ruled that if there was a time that the house and land did not remain under the control of the antislavery members of the church, "and if the church standing on said land was used for lectures, concerts, shows, dancing parties, and for other public assemblies, and not for the purpose of religious meetings during the occupation of the defendant as lessee in 1848, and as purchaser in 1849, and afterwards, then there was a breach of such second or other condition;" and, against the defendant's objection, admitted evidence to prove this.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued by the same counsel at October term 1861.

Bigelow, C. J. The trial of this case seems to have proceeded on a misconception of the effect of the evidence, which was offered to show that the religious society had formed a connection with the conference of the Methodist Episcopal

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Church of the United States. Assuming that the court was correct in ruling that there were two separate and distinct conditions in the deed, this evidence proved a breach of both. The act of uniting with and placing the property under the control of the conference not only showed a breach of the condition, which was designed to prevent any such connection with the conference, but also of the other alleged condition, so that, after the connection was formed, the building and land no longer remained under "the direction and control of such members of said church as are embraced with the feelings and opinions of the Antislavery Society for the immediate abolition of slavery in the United States." The error at the trial consisted in assuming that the second alleged condition was not broken till the premises were occupied by the defendant as lessee in 1848, or as purchaser in 1849, and in confining the defendant to acts of the grantor subsequent to that time as tending to prove a waiver of it. When a forfeiture is once waived, a court of law will not aid a party in enforcing it. If the grantor, subsequently to the time when the property was placed under the control of the conference and ceased to be under the management and direction of the antislavery members of the society, by acts and conduct which were inconsistent with his right to insist on a forfeiture, waived the breach of the condition, he could not afterwards seek to enforce it by reason of acts which did not create any new or further breach of the condition. In such case the condition was saved, and the right to re-enter was gone. *Goodright* v. *Davids*, Cowp. 805. *Andrews* v. *Senter*, 32 Maine, 394. It is clear therefore that the defendant had a right to rely on the evidence of acts of the grantor, which occurred after October 1840 and prior to 1848, as tending to show a waiver of both the conditions; and that the court erred in ruling that there was a new and distinct breach in 1848, which must be shown to have been waived by acts and declarations subsequent to this period. On this ground, without deciding other questions raised by the exceptions, which on another trial may become immaterial, the order must be

Exceptions sustained.

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At October term 1864 of the superior court, a trial by jury was waived, and the case was heard before *Lord*, J., who found that the breaches of condition relied on had been waived, and upon his finding judgment was rendered for the defendant

JOHN R. PACKARD & another *vs.* FRANKLIN AMES & another.

A deed of land to a number of persons incorporated as a religious society, *habendum* to them and to their heirs and assigns "and to each and every person who may hereafter become lawful owners and proprietors of a pew in the meeting-house to be built and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors, to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting-house to be built and rebuilt on the said lot of land forever," without any clause providing for forfeiture or re-entry, is not a grant upon condition that a meeting-house shall be erected and maintained upon the land conveyed.

WRIT OF ENTRY by the heirs at law of Joseph S. Packard to recover a lot of land in North Bridgewater.

At the trial in the superior court in Plymouth, the tenants claimed title under a deed of the premises, dated November 15th 1825, from Joseph S. Packard to Micha Packard and twenty five others, who, as was therein recited, "have associated together and have entered into a contract as proprietors, for the purpose of building and erecting on the lot of land hereinafter mentioned, a meeting-house for the public worship of God:" "To have and to hold the aforegranted lot of land to the said proprietors and to their heirs and assigns, and to each and every person who may hereafter become lawful owners and proprietors of a pew in the aforesaid meeting-house to be built and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors, to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting-house to be built and rebuilt on the said lot of land forever."

It was proved and admitted that the grantees named in the deed, together with some other persons, were incorporated on

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the 18th of June 1825 as the Second Congregational Society in North Bridgewater; that before the date of the deed they accepted and organized under their act of incorporation, and proceeded to make contracts for building a meeting-house on the premises, which was afterwards built; that this meeting-house was destroyed by fire on the 25th of December 1856, since which no steps had been taken for the erection of another; that no meeting of the society had been held for twelve years, and it had in fact ceased to exist; and that before the commencement of this action the tenants had divided the premises into house-lots, for the sale of which they had made contracts.

Ames, J. ruled that the deed of Joseph S. Packard was of an estate upon the condition of erecting and forever maintaining, on the premises conveyed, a house for public worship; and that the above facts proved such a breach of the condition as to entitle the demandants to enter and to revest themselves as of the former estate of the grantor; and directed a verdict for the demandants, which was returned. The tenants alleged exceptions.

E. Ames & J. White, for the tenants.

C. T. Russell, (*J. R. Perkins* with him,) for the demandants.

Bigelow, C. J. The construction of the deed from Joseph S. Packard to Micha Packard and others, proprietors, was considered by this court in *North Bridgewater Congregational Society* v. *Waring*, 24 Pick. 304. It was there held that an estate in fee vested in the grantees to the use of the proprietors of pews therein designated, the use shifting to such as should thereafterward become pewholders. No intimation was there made that the conveyance was on a condition subsequent. Nor, on careful consideration of the terms of the grant, can we see any valid ground for holding that such is the true interpretation of the deed. There are no apt or proper words to create a condition; there is no clause of re-entry or forfeiture. The only words which bear any semblance of an intent to restrict the title conveyed by the deed are found in the habendum. These are merely that the grantees, the proprietors of pews, should hold the estate for the purpose of erecting and maintaining thereon a house for public

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worship. But we know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be on a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate, unless coupled with a clause for the payment of money or the doing of some act by the grantee, on which the grant is clearly made to depend. Without some such clause, a grant for a specific purpose can be held at most only to create a trust, but not an estate on condition. Co. Lit. 203 *a*, 204 *a*, 204 *b*, 214 *b*. Shep. Touchst. 123, 124, 133. *Cowper* v. *Andrewes*, Hob. 41. *Norfolk's case*, Dyer, 138 *b*. *Exceptions sustained.*

SAMUEL T. SILSBY *vs.* WILLIAM A. BARLOW & others.

A testator gave a legacy "to the Baptist Society in P., the yearly interest of which is to be appropriated to the support of their minister." More than twenty years before the death of the testator a Baptist church had been organized at P., and had ever since maintained its existence; during the same time there had been a meeting-house, owned by pewholders, of whom some were and others were not members of the church, in which worship had been maintained during a considerable portion of the time by members of the church, pewholders and other persons; but no society had ever been organized or incorporated, or held any formal meetings or kept any records. *Held*, that the church was not entitled to receive the bequest; but that the persons usually attending worship in the meeting-house constituted an unincorporated religious society, within the meaning of the Rev. Sts. *c.* 20, § 25; and that an agent or trustee to be elected by the adult male members of such society in the manner provided in that section would be entitled to receive it.

The provisions of the Rev. Sts. *c.* 20, § 25, are not affected by the *Sts.* of 1855, *c.* 314, and 1858, *c.* 133.

CHAPMAN, J. The plaintiff in this bill, as executor of the will of Joseph Lawrence, who died on the 21st of February 1859, seeks the aid and direction of the court in respect to a bequest of ten shares of bank stock "to the Baptist Society in Pocasset, Sandwich, the yearly interest of which is to be appropriated to the support of their minister, while time shall last."

By the testimony of William A. Barlow, and by the church records, it appears that in April 1838 a Baptist church was organized at the village of Pocasset, and has ever since main-

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tained its existence. There has been, during the same time, a meeting-house in which worship has been maintained for a considerable portion of the time. It is owned by pewholders, some of whom are members of the church and others are not. There is also what he denominates a society; but it has never been organized or incorporated; it has never held any formal meetings nor kept any records. It consists of those who attend public worship at the meeting-house, whether members of the church, pewholders or others. Barlow has been elected the agent of the church, and appears and answers on its behalf and on behalf of the society, claiming the legacy. On the other hand, the plaintiff contends that the church is not the legatee, that the society has no such existence as enables it to take the legacy, and that for want of an existing legatee the legacy is lapsed. It becomes necessary therefore to consider the true character of the church and society.

A church is understood, among those whose polity is congregational or independent, to be a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A religious society is a body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments. A church and society are often united in maintaining worship; and in such cases the society commonly owns the property and makes the pecuniary contract with the minister. But in many instances societies exist without a church, and churches without a society. Churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers. By our statutes their officers have sufficient corporate powers to enable them to hold any property that may be given to their church. Originally all our religious societies were corporate bodies. The towns at first exercised parochial powers, most of the people of this state being of one denomination. But as varieties of opinion sprung up, it became necessary to separate the parochial from the municipal business, and the parishes formed separate organizations. Other religious societies were incorporated by special acts; but many congregations remained unincorporated. Some persons

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had conscientious scruples against corporations, and others preferred to manage their religious affairs in a different way. The *St.* of 1811, *c.* 6, § 3, was enacted for the benefit of such persons. It enabled unincorporated religious societies to take and hold property, manage, use and employ the same, choose trustees, agents and officers therefor, and constituted them corporations so far as might be necessary. The same provision was re-enacted in *St.* 1834, *c.* 183, § 5, and in the Rev. Sts. *c.* 20, § 25. The last act was in force when this will took effect.

It is suggested that the *Sts.* of 1855, *c.* 314, and 1858, *c.* 133, both of which are since repealed, may apply to this case. But we are of opinion that they do not. They were not intended to affect the provision above cited from the Revised Statutes.

The legacy in question not being given to the church, Mr. Barlow is not entitled to receive it. But the persons who usually attend worship at the meeting-house, whether members of the church, pewholders or others, constitute such an unincorporated religious society as is provided for in the Rev. Sts. *c.* 20, § 25; and they may choose an agent or trustee pursuant to that section, to whom the legacy should be paid. He should be chosen by the male members who are over twenty one years of age. As the legacy is to constitute a permanent fund, it will probably be most convenient for them to have a full and perfect organization under the statute; but they must judge of the expediency of such a course. *Decree accordingly.*

T. M. Stetson, for the plaintiff, and *T. L. Wakefield*, for the residuary legatees, cited *Stebbins* v. *Jennings*, 10 Pick. 183; *Baker* v. *Fales*, 16 Mass. 503; *Weld* v. *May*, 9 Cush. 188; *Going* v. *Emery*, 16 Pick. 114; *Bartlett* v. *King*, 12 Mass. 540; *Bartlett* v. *Nye*, 4 Met. 380; Rev. Sts. *c.* 20, §§ 3, 25, 39; *Sts.* 1855, *c.* 314; 1858, *c.* 133.

W. H. Wood, for the defendant Barlow, cited *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Washburn* v. *Sewall*, 9 Met. 280; *Winslow* v. *Cummings*, 3 Cush. 358; *Christian Society in Plymouth* v. *Macomber*, 5 Met. 155; *Lawrence* v. *Fletcher*, 8 Met. 153; *Baker* v. *Fales*, 16 Mass. 505.

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Abiathar Hoxie & others *vs.* Elkanah Finney.

In a deed of all the grantor's "right and title to one undivided third part of" land bounded and described, covenants that he is seised in fee of the granted premises, that they are free from all incumbrances, and that he will warrant them to the grantee against the lawful claims of all persons, are limited in effect by the description of the subject granted; and are not broken by an eviction of the grantee under an incumbrance previously created by the grantor.

Action of contract upon the covenant of warranty in a deed from the defendant to Henry Finney. Trial in this court before *Merrick*, J., who reported the case to the full court upon the question whether a breach of the covenant, which would maintain this action, was shown by the following facts:

Elkanah Finney died seised of land in Plymouth, leaving a widow and eight children, among whom were the defendant and Henry Finney. In 1838 partition was made of his estate among his children; and they and the widow executed an indenture, by which, in consideration of a release of her right of dower, they covenanted and agreed, "each for themselves and not for the others," to pay to her the sum of sixty two dollars and fifty cents each, amounting in the whole to five hundred dollars, annually, and mortgaged to her their several shares of the land to secure the performance of this agreement.

In 1844 the defendant conveyed "all his right and title" in the land which had been set off to him, describing it by boundaries, to his brother Henry Finney in fee, with covenants that he was lawfully seised in fee of the aforegranted premises, that they were free of all incumbrances, that he had good right to sell and convey the same, and that he would warrant and defend them to the grantee, his heirs and assigns, against the lawful claims and demands of all persons. Henry Finney afterwards took the benefit of the insolvent laws, and his assignee sold and conveyed to the plaintiffs the real estate so conveyed to him by the defendant.

In 1858 the widow entered and took possession of the land for a breach of the condition of the mortgage to her, and for

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the purpose of foreclosing the same, and has since continued in possession thereof.

E. Ames, for the plaintiffs.

C. G. Davis, for the defendant.

DEWEY, J. The effect of covenants in the form of those in the deed from the defendant to Henry Finney has become a settled question with us. A deed "of all my right, title and interest in certain real estate," &c., purports to convey merely such right as the grantor had in the land; and as the grantor conveys his own title only, the general covenants of seisin in fee of the aforegranted premises, that they are free from all incumbrances, that the grantor has good right to sell and convey the same, and that he will warrant and defend the same against the lawful claims and demands of all persons, are all qualified and limited by the granting clause of "all my right, title and interest" in the premises. *Allen* v. *Holton*, 20 Pick. 458. *Blanchard* v. *Brooks*, 12 Pick. 47. *Sweet* v. *Brown*, 12 Met. 175.

As to this last case, the counsel for the plaintiffs has called the attention of the court to the declaration, as really setting forth as the cause of action a breach of covenant, applicable not to that particular parcel of the estate described by metes and bounds, but to a parcel of the land granted under the general description, "one lease in the Cowell Pasture"; and suggested whether that might not affect the case. The reported statement of the case for the court properly stated it thus: "The plaintiff contended that the covenants in the deed applied to certain specific parcels of real estate particularly described, and the defendant contended that as the deed only conveyed all the right, title and interest of the defendant in the premises, the covenants could be held to extend no further." The principle settled by the case, in any view of the facts there in issue, is that such a warranty as that in the case now before us must be taken as limited and restricted to the grant.

It is, as we understand, conceded that such would be the construction of these covenants, if the incumbrance had been created by some other party than the defendant. But it is con-

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tended that it is otherwise in case of an incumbrance created by the grantor. In the present case, the incumbrance set up as breach was a mortgage executed by both the grantor and grantee in this deed, with the other heirs at law of the late Elkanah Finney deceased, in consideration of a release of his widow's interest in the real and personal estate of said Elkanah Finney, to pay her an annuity during her life.

The plaintiff urges upon our consideration the cases of *Calvert* v. *Sebright*, 15 Beav. 156, *Steiner* v. *Baughman*, 12 Penn. State R. 106, and *Mills* v. *Catlin*, 22 Verm. 98. Those cases, though not precisely similar to the present, seem to qualify the general doctrine restricting in all cases the general covenants to the language of the grant. Our doctrine on the subject is well established, and we perceive no sufficient ground for introducing the proposed exception to the general rule so fully acknowledged and sanctioned. If we do not thus limit the covenant to the interest conveyed, but give it an effect beyond that, why should it not have full effect as a warranty against any and every outstanding title or incumbrance? This doctrine no court is understood to adopt as to such covenants, when connected with a mere conveyance of "the right, title and interest" of the grantor.

In the opinion of the court this action cannot be maintained upon the covenant of warranty in the deed, for the breach alleged. *Plaintiffs nonsuit.*

JAMES M. RANDALL & wife *vs.* FRANCIS S. WYMAN.

Under *St.* 1852, *c.* 256, an officer's return of the levy of an execution, which states that he appointed an appraiser for the debtor, "he being absent from the Commonwealth and not a resident therein, and having no agent or attorney known to said officer," shows a sufficient reason for such appointment, without also stating that the debtor had neglected to appoint an appraiser.

WRIT OF ENTRY to recover land in Scituate. Plea, nul disseisin. At the trial in the superior court, the demandants put in evidence the record of a levy by extent upon the demanded

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premises of an execution issued on the 16th of May 1859 on a judgment against James Wyman, from whom the tenant derived his title. The officer's return stated that one of the appraisers was appointed by the judgment creditor; a second by the officer "for James Wyman, the debtor, he being absent from the Commonwealth, and not a resident therein, and having no agent or attorney known to said officer;" and the third by the officer.

The demandants having rested their case upon this evidence, the tenant moved for a nonsuit, on the ground that the levy was void, because the officer's return did not set forth that the debtor had neglected to appoint an appraiser, and therefore did not show any authority in the officer to appoint one for him. But *Russell*, J. overruled the motion, and ruled that the officer's return was sufficient, and the levy valid. The jury returned a verdict for the demandants, and the tenant alleged exceptions.

H. G. Parker, for the tenant.

J. M. Randall, for demandants.

Dewey, J. This court, in the cases of *Leonard* v. *Bryant*, 2 Cush. 32, and *Shields* v. *Hastings*, 10 Cush. 247, had held that a levy of execution upon real estate was void when the officer appointed an appraiser for the debtor, unless he stated in his return that the debtor had neglected to appoint one, in the language of the statute provision, Rev. Sts. *c.* 73, §§ 3, 23. In the first of the cases above cited, the reason assigned for the appointment by the officer was, "the debtor not being a resident within the Commonwealth." In the latter case, the reason stated was "not being within my precinct, but out of the State, and having no agent or attorney known to me." This case had reaffirmed the earlier case, and gone a step further, as the return of the officer stated the additional fact of the debtor's having no agent or attorney known to the officer.

The *St.* of 1852, *c.* 256, was passed during the pendency of this latter case, though apparently before the final judgment in the same. It probably was thought to present a case of an evil to be remedied by legislation. This statute declared the causes for which an officer would be justified in appointing an appraiser

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for the debtor to be "if the judgment debtor shall be absent from the Commonwealth or not a resident therein, and shall have no agent or attorney known to the officer, or shall neglect to appoint an appraiser." It will be perceived that the reasons for such appointment are enlarged, and embrace the very case which this court had held was not sufficient to justify the officer in making the appointment.

It is contended by the counsel for the tenant, that the proper construction of this new statute is to hold that all the facts above recited must exist, and that the word "or" should read "and," thus connecting the different provisions and requiring their existence as a whole, and a return so stating the facts, to render the levy valid.

If the evil to be remedied was the avoiding of levies for defects in the return, which were deemed rather formal than necessary to the security of the rights of the parties, this evil of defective returns would probably be much increased by requiring the additional facts to be stated that are recited in this statute.

In the opinion of the court, the legislature intended, as they have stated in the words of the statute, to authorize the officer about to levy an execution on real estate to appoint an appraiser for the debtor; 1st. if the debtor was absent from the Commonwealth or not a resident therein, and had no agent or attorney known to the officer; 2d. or neglected to appoint an appraiser. The return was to be held sufficient if either of these two states of facts existed, and was so stated in the return of the officer.

The return in the present case does state the first cause recited in the statute, and therefore is sufficient. The omission to add the second cause for appointing an appraiser, namely, "that the debtor neglected to appoint an appraiser," does not render the levy invalid.

The last paragraph in this statute has no reference to future levies, but was intended to provide for cases of defective levies "heretofore made," and to enable the judgment creditor to sustain what had been held a defective return of the officer, by proof of the facts recited in the statute by other evidence, to

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be offered on the trial of the validity of the levy. But the legislature made no similar provision as to future levies, and we must therefore suppose that they had so far modified the law on the subject by this statute, that much less occasion would exist for allowing proof at the trial in aid of the return.

Exceptions overruled.

ISAAC BRIGGS *vs.* INHABITANTS OF ROCHESTER.

An inhabitant of a town within the Commonwealth, who before the first of May has left the Commonwealth with the intention of never returning, and of taking up his abode in a town in another state, and is on the first of May in another town in that state, is not under the Rev. Sts. c. 7, § 9, taxable in the Commonwealth on the first of May, although he has not yet acquired a domicil in the other state.

ACTION OF CONTRACT to recover back the amount of a tax on personal property. Trial in the superior court before *Ames*, J., who signed this bill of exceptions:

"It was admitted by both parties and so presented to the jury, that the only question at issue was the domicil of the plaintiff on the 1st of May 1858; and that if he was then an inhabitant of the defendant town, the tax was rightly imposed; but that if he was not on that day an inhabitant of said town, he was not then rightly taxable and taxed therein.

"There was evidence tending to show that on the 10th of April 1858 the plaintiff left Rochester with the intention to make his home in the future in Motthaven, N. Y., and no longer to be an inhabitant of or have his home in said Rochester; that in three or four days he arrived at the city of New York, stayed in New York city at the house of his son till and including the 1st of May 1858, and then went to Motthaven, his present residence.

"The plaintiff asked the court to rule: 1st. That if he left Massachusetts, intending no longer to be an inhabitant thereof, and went into and arrived in another state before the 1st of May 1858, intending and meaning at once to be and become an inhabitant thereof, and to make his home therein, he was

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not taxable in Rochester as an inhabitant thereof on said 1st of May. 2d. That if before said 1st of May he left Rochester, intending no longer to make his home there, and went into the State of New York, intending to make his home there, and substantially to the contemplated place of his domicil, he was no longer taxable as an inhabitant of Rochester.

"But the court refused to give the above instructions desired; and instructed the jury, that if the plaintiff had not in fact taken up his abode at Motthaven, his intended future residence, on the 1st of May 1858, his domicil of origin continued, and he was legally taxable on that day as an inhabitant of Rochester. The jury found for the defendants, and to the following written question: 'Is it proved that the plaintiff had taken up his abode at Motthaven on May 1st 1858?' they returned with their verdict an answer in the negative. The plaintiff, being aggrieved by such refusal, excepts thereto."

T. M. Stetson, for the plaintiff.

C. I. Reed, for the defendants. The plaintiff did not acquire a domicil in the State of New York, nor lose his domicil in Rochester, before he reached his intended home. Every man has a domicil for taxation somewhere. *Abington* v. *North Bridgewater*, 23 Pick. 177. *Thorndike* v. *Boston*, 1 Met. 242. That domicil is retained until he acquires another. *Thorndike* v. *Boston*, 1 Met. 242. *Bulkley* v. *Williamstown*, 3 Gray, 493. Another domicil is not acquired while the person is *in transitu*. Story Confl. § 47. *McDaniel* v. *King*, 5 Cush. 475. *Bulkley* v. *Williamstown*, 3 Gray, 493. *Otis* v. *Boston*, 12 Cush. 44. The plaintiff could not acquire a domicil in the State of New York without acquiring one in some town of that state. *Otis* v. *Boston*, 12 Cush. 48. In order to be an inhabitant of a state, one must be an inhabitant of some town in the state. Suppose that before reaching his destination, but after getting into another state, a man should change his mind and return to and resume his domicil in this state; would he be obliged to live here a year before he could vote?

METCALF, J. The facts which the evidence at the trial tended to prove were these: That in April 1858 the plaintiff,

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who was then an inhabitant of the town of Rochester, removed out of the State, with the intention not only not to return and have his home in that town, but also with the intention to make his future abode and home in Motthaven in the State of New York; but that, before he took up his intended new abode, he stopped at the house of his son in the city of New York "till and including the 1st of May 1858;" and that shortly afterwards he went to Motthaven, where he has since resided. On these facts the question is, whether the plaintiff, on the said first of May, was an inhabitant of the town of Rochester, within the meaning of the ninth section of *c.* 7 of the Revised Statutes, which directs that "personal estate shall be assessed to the owner in the town where he shall be an inhabitant on the first day of May."

There is no adjudged case in our reports, which is decisive of this. In no one of the decisions there found, in which a person has been held liable to taxation in a town that he had left before the 1st of May, had he removed out of the State before that day, with the intentions which this plaintiff had when he removed from Rochester. According to those decisions, if the plaintiff had removed in April from Rochester to some other town within the State, intending to make his home there until he should proceed to Motthaven, in pursuance of his original intent, and had remained in such town until after the 1st of May, he would have been taxable there. *Kilburn* v. *Bennett*, 3 Met. 199. But if he had removed to such town for a mere temporary purpose, not intending to make a home there, he would have been taxable in Rochester. *Bulkley* v. *Williamstown*, 3 Gray, 493. In either case, as said by Shaw, C. J. in *Otis* v. *Boston*, 12 Cush. 50, he certainly would have been an inhabitant of the State, and taxable in some town. In the same case, the chief justice also expressed an opinion, that if a person, on the 1st of May, was on his journey to a new place of abode in another town within the State, he would be taxable in the town from which he was removing. But he also said, that if a person had left the State, and actually passed its limits, on his way to a distant state, it would be a question of more difficulty,

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in its various aspects; but that the court then had no occasion to determine such a question. We must now determine it, for we have no doubt that the plaintiff, while stopping at his son's house, must be deemed to have been on his way — *in itinere* — to Motthaven.

The present question may be put into this form: Do the words, "in the town where the owner is an inhabitant," mean the town where he has a domicil, in its strictly technical sense, and with its legal incidents? If such be their meaning, the plaintiff was rightly taxed in Rochester. For he once had a domicil there; he had not on the 1st of May 1858 acquired a new domicil in Motthaven; and he could not be without a domicil while on his way to that place. Phillimore on Domicil, 11 – 14, 21 – 24. Story Confl. §§ 44 – 47. 12 Cush. and 3 Gray, *ubi sup.* *Jennison* v. *Hapgood*, 10 Pick. 98. But we do not understand that those words have such a meaning.

The word "domicil" is not in the Constitution nor in the statutes of the Commonwealth; but the words "inhabitant" and "resident" are frequently used in both. By the Constitution, *c.* 1, § 1, art. 4, the legislature is empowered "to impose and levy proportional assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth." By the next section, certain described "inhabitants" of the Commonwealth are made legal voters for certain state officers; and it is there declared that for the purpose of electing and being elected into any office within the State, every person shall be deemed an inhabitant in that town, &c., where he dwelleth or hath his home. It is provided by the Rev. Sts. *c.* 2, § 6, that in the construction of all statutes the word "inhabitant" may be construed to mean a resident in any city or town. And it has repeatedly been said by this and other courts, that the terms "domicil," "inhabitancy" and "residence" have not precisely the same meaning. *Lyman* v. *Fiske*, 17 Pick. 234. *Thorndike* v. *Boston*, 1 Met. 245. *Foster* v. *Hall*, 4 Humph. 348. *Warren* v. *Thomaston*, 43 Maine, 412.

In the statute on which this case depends, we are of opinion

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that the words, "where he shall be an inhabitant on the first day of May," mean where he shall have his home on that day. In 12 Cush. 49, Chief Justice Shaw said: "Perhaps it would have been quite as near the purpose of the legislature, in fixing a standard of liability to taxation, perhaps not more so, to say that it shall be where he hath his home, instead of where he shall be an inhabitant."

This plaintiff did not reside or dwell in Rochester on the 1st of May 1858, nor had he then a home there. He had left the town, removed out of the State, and abandoned his home, with an intention never to resume it, but with an intention, which he soon carried into effect, to make a new home in the State of New York. And certainly there is no good reason, if the statute does not peremptorily so require, that he should be taxed in this state for expenses incurred in support of its institutions, after he left it, and ceased to receive benefit from them, either by participating in the actual enjoyment of them, or by deriving, through their instrumentality, protection to his property or his person.

As the verdict was returned under instructions that do not conform to the foregoing views of the law, it is to be set aside and a *New trial granted.*

Inhabitants of Plymouth *vs.* County Commissioners of Plymouth.

County commissioners cannot be allowed to file separate answers to a petition for a writ of *certiorari* to quash proceedings of their board.

An assessment of damages, signed by a majority of the county commissioners, after a hearing by the whole board, is valid.

Technical objections to a petition to county commissioners for the assessment of damages cannot be first made upon an application for a writ of *certiorari* to quash their proceedings.

A writ of *certiorari* will not be granted to quash the proceedings of county commissioners in assessing damages for the taking of private property for public uses, because the commissioners have assessed the entire damages suffered on a petition which does not definitely allege the extent of the damages, if no objection was made at the hearing before the commissioners to the admission of evidence of the extent of the damages caused by the taking.

A petition to county commissioners to assess the damages caused by the taking of water and of water power for a public use, under *St.* 1855, *c.* 61, alleged the petitioners' seisin

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Inhabitants of Plymouth v. County Commissioners of Plymouth.

and possession of a mill and water power, and set forth the nature and extent of their rights in such water power, and in the water of a certain pond, and then alleged that the town took a portion of the said water power and water, tapping said pond and conducting a part of the water by a canal to another pond, and at sundry times deepened the canal, thereby diverting a portion of the water of the first pond which formerly flowed by the petitioners' mill, and diminishing their water power. *Held*, that an assessment of damages upon this petition should not be quashed on a writ of *certiorari* for uncertainty in the petition; nor because it appeared by another petition for the assessment of like damages, that the commissioners, without objection, so far as appeared, had assessed entire damages under the first petition; nor because the petition did not allege that the price to be paid by the town for taking the water could not be fixed by agreement with the owners.

Petition filed at May term 1858 in Plymouth, for a writ of *certiorari* to quash an assessment of damages by the county commissioners of Plymouth on the 8th of January 1858, after a hearing before the whole board, and signed by Martin Bryant and James Bates, two of the three commissioners, upon a petition of the Russell Mills, for water and water power taken by the town of Plymouth under the *St.* of 1855, *c.* 161.

Upon this petition notice was ordered to the county commissioners. At October term 1858 they filed a joint answer, stating, among other things, that, immediately after such hearing and assessment, Mr. Bryant went out of office; that after the signing of the assessment Mr. Bates became satisfied that it was made upon erroneous principles as to damages and under a mistake of the facts; and that the present board of commissioners were unanimously of opinion that it ought not to be enforced, and that a new hearing ought to be had, but were in doubt as to their power to order a new hearing.

In 1859 Mr. Bates moved for leave to file a separate and amended answer.

W. G. Russell, in support of the motion.

C. G. Davis, for the petitioners.

By the Court. Notice was properly ordered to the county commissioners of the petition for a writ of *certiorari* to quash the proceedings of that tribunal. The answer or return to this petition is the act of the court, and must be the joint answer of those having by their clerk the custody and control of the record of the proceedings sought to be quashed. Separate answers cannot therefore be allowed.

Motion overruled.

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The case was now argued on the petition and original answer, and is stated in the opinion.

B. F. Thomas & Davis, for the petitioners.

Russell, (*E. Ames & W. Whiting* with him,) for the respondents.

DEWEY, J. This is an application for a writ of *certiorari* to the county commissioners of the county of Plymouth, to certify to this court their proceedings upon a petition by the Russell Mills, praying for an assessment of damages against these petitioners for taking certain water power. The application for a writ of *certiorari* is not supposed by either party to open the questions at issue between the parties upon the merits of the case generally, as they might have been raised upon the original hearing. Whatever errors may have been committed by the commissioners in this respect, they being the constituted tribunal to settle the amount of damages, we have only to inquire whether these proceedings have been within their proper jurisdiction, and not in violation of law. Even technical errors of law, not affecting the substantial justice of the case, will not require us to grant a writ of *certiorari*. Hence in the present case, although it may be alleged that excessive damages have been awarded by the county commissioners, yet we cannot review their judgment in that respect upon this petition.

Many of the causes of complaint set forth in the petition for a writ of *certiorari* were not pressed upon us at the argument, either for the reason that they were not open here, or for other causes, and we shall confine ourselves to the consideration of the grounds now urged as reasons for granting the prayer for a *certiorari*.

1st. There is no doubt that the award of a majority of the commissioners assessing damages in such cases would be a good award, although one of their number should dissent therefrom. Rev. Sts. *c.* 2, § 6, *cl.* 3.

2d. It is equally clear that the damages claimed by the Russell Mills were to be determined in accordance with the proceedings before county commissioners under the Rev. Sts. *cc.* 24 and 39; and not under *c.* 116, containing provisions for

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assessing damages occasioned by the erection of mills and the flowing of lands. Under the *St.* of 1854, *c.* 351, certain species of damages that might be sustained by the construction of this aqueduct were to be assessed in the manner provided by the Rev. Sts. *c.* 116; but that act gave no authority to the town of Plymouth to take water or water power, except by purchase, and no provision was made therein for assessing damages for the taking of water and water power without such purchase from the owner. The *St.* of 1855, *c.* 61, which did give such power, prescribed that the price to be paid in the latter case should be estimated by the county commissioners in the manner provided in the 24th and 39th chapters of the Rev. Sts. We are therefore solely to inquire whether the proceedings in question are in conformity with the chapters last mentioned.

Upon recurring to the petition filed by the Russell Mills, it will be found that the petitioners allege their seisin and possession of a mill with water power and privileges, and the right of having all the water of a certain stream flow into their pond and over their dam for the benefit of their mill, setting forth in their petition the nature and extent of their rights in such water power, and in the water of Great South Pond, and then proceeding to allege that the town of Plymouth, "on the 1st of August 1855, and in May 1856, and subsequently, by its agents, took a portion of the said water power and water, tapping said South Pond, and conducting a part of the water by a canal to Little South Pond, so called, and at sundry times deepening said canal, thereby diverting a portion of the water of the said South Pond, which had been used to flow by said watercourse to the privilege of the petitioners as aforesaid, and diminishing the force and volume of said watercourse, and diminishing the water power of the petitioners; and said town took the said water and water power under chapter 351 of the statutes of 1854, and chapter 61 of the statutes of 1855, for the construction, maintenance and supply of the aqueduct authorized in said acts."

Upon this petition the commissioners assessed damages in favor of the Russell Mills in the sum of $ 15,061.93. To this

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assessment the town of Plymouth objects that the proceedings are voidable for uncertainty; and that this assessment of damages, by reason of such uncertainty and indefiniteness, and because it would be no bar to a future petition for the like damages for taking the water and water power of the Russell Mills, should be avoided by a writ of *certiorari*. The alleged uncertainty is in reference to what portion of water power is stated to have been taken or injured, or to be the subject matter for which the damages are awarded.

This objection, so far as it may apply to any defect in the petition itself, setting forth the claim for damages, comes at a very late stage, not having been made a ground of objection at the hearing before the commissioners, so far as we are informed. The form of this petition is not therefore to be subject to those critical or technical objections that might have been properly urged at an earlier stage of the case, and before the submission to the commissioners and the publication of their award thereon.

It is not in accordance with the usual practice in applications for damages for land taken, or for other interests affected by the location of railroads or highways, to set forth minutely the extent of the damages. The allegation of the taking of the property in such cases is general, and damages are awarded to the extent of the injury shown. It is true that in the case of railroads and highways, there is required to be a location duly made and recorded by the party taking the land, and this may to some extent render more definite the precise injury for which damages are awarded. If the statute under which this water power was taken did not make the full provision as to specifying the extent of the taking, or the injury for which a claim arose for damages, the statute, being a private act procured by the town of Plymouth, must be taken to be accepted and approved by the town, and no prejudice should result to the party whose land or water power is taken, from the want of greater definiteness and certainty as to the amount of water power taken and appropriated by the construction of the aqueduct.

Looking at the record of this particular petition, we perceive

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no ground for maintaining the position that the award embraced damages beyond those stated in the petition. The assessment is made upon it, as found recited in the decree of the commissioners. It is in the answer of the commissioners to another petition, that of the Russell Mills, for a jury to pass upon a second petition of theirs for further damages, that we find the statement that "they have estimated and allowed the Russell Mills the whole value of all the water of Great South Pond, and comprised all that could be taken by said town of Plymouth on a previous petition." We do not perceive that any objection was taken by the town of Plymouth at the hearing to the admission of evidence of the extent of the loss occasioned by taking the water power of the Russell Mills in the construction of the aqueduct. On the contrary, it was stated at the argument, and not controverted, that the position was taken by the town of Plymouth at the hearing of these two petitions before the commissioners, that all the damages recoverable for interfering with the privileges of the Russell Mills at the Great South Pond and taking their water power must be recovered under the first petition, and that this was a bar to any recovery for any damage set forth in the second petition; and certainly this view was adopted and acted upon by the commissioners, and the claim set up under the second petition wholly rejected. Taking the record merely of the first petition and the proceedings under it, including the assessment of damages, there is nothing to indicate that the damages were assessed for any other claims than those set forth in that petition. If we look beyond this, and recur to the evidence of what took place, as derived from other sources, although we find that the commissioners allowed to the Russell Mills on the first petition the whole damages sustained by them by the taking of their water privilege, yet we also find that any recovery beyond what was embraced in the first petition was objected to by the town of Plymouth, and that they had the benefit of a finding in their favor on the second petition, and an allowance of their costs on the same, because the whole damages for such taking had been allowed on the first petition. Further, it may be added

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that the two petitions would clearly embrace all the claims for which damages were assessed. Both were acted on by the commissioners, and the two awards will together form a perfect bar to a future petition for damages sustained by the Russell Mills, by the taking of their water power for the construction of the aqueduct.

It becomes therefore only necessary to consider whether the petition, upon which the damages were awarded, is so far defective and uncertain in setting forth the taking of the water power of the Russell Mills, and the extent of the injury sustained thereby, as to require us to order a *certiorari* on that account. In the opinion of the court, this point taken by the present petitioners is not maintained. As to the objection that there is no sufficient allegation that "the price to be paid by the town for taking the water could not be fixed by agreement with the owners thereof," that is perhaps sufficiently answered by the allegation in the petition that "the town of Plymouth has neglected and refused to make compensation." But beyond this, the objection comes too late, after the adjudication and award of the commissioners upon a hearing of both parties.

Writ of certiorari refused.

RUSSELL MILLS *vs.* COUNTY COMMISSIONERS OF PLYMOUTH.

The county commissioners have no authority to issue a warrant of distress to compel the payment by the town of Plymouth of damages assessed for the taking of land, water or water power for the construction of water works under St. 1855, c. 61.

DEWEY, J. The Russell Mills ask this court for a writ of mandamus to the county commissioners of the county of Plymouth to issue a warrant of distress against the inhabitants of the town of Plymouth for the amount of damages awarded by the commissioners in their favor by the proceedings recited in the preceding case, *ante*, 341. The general authority to issue such writ in all proper cases is not denied.

Several objections are urged in behalf of the respondents

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against the exercise of this power in the present case. Some of these are answered by the opinion of the court pronounced in the previous case.

The objection most strongly urged, however, and which is certainly of vital importance, is that the county commissioners had no power to issue a warrant of distress to enforce their assessment of damages. It is said that there is no provision of law to authorize it. If this be so, of course no mandamus should issue. The county commissioners are a tribunal of limited powers, and not to be confounded with our common law courts. Their powers are to be found in the statutes giving them jurisdiction of the various classes of cases committed to them. Their jurisdiction to act upon the petition of the Russell Mills, and assess damages for the taking of their water power by the agents of the town of Plymouth, is derived from the *St.* of 1855, *c.* 61, providing that if the price to be paid by the town for the water power thus taken "cannot be fixed by agreement with the owners thereof, the same shall be estimated by the county commissioners in the manner provided in the twenty-fourth and thirty-ninth chapters of the Revised Statutes." The provisions of the *St.* of 1854, *c.* 351, are not applicable to the assessment of damages of the present character. We are at once referred back to the provisions of the Rev. Sts. *cc.* 24, 39, for the power vested in the commissioners by those chapters.

The case of enforcing the payment of damages for taking land for a highway is not provided for in any such mode as by warrant of distress by the commissioners, for the obvious reason that such damages are paid by the county, and their simple orders on the county treasurer are supposed to be sufficient to secure prompt payment of all damages awarded by them, payable by the county. Rev. Sts. *c.* 24, § 42. Another class of cases, the neglect of a town to make a road when required by the county commissioners, the expenses of which are chargeable upon the towns in which the road is situated, is provided for by §§ 44, 45, and authority is given to issue warrants of distress against such town upon failure to make repairs, or to pay the sums expended thereon.

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The 39th chapter of the Revised Statutes embraces the cases of turnpikes and railroads. As to turnpikes, the corporation is by § 3 made liable to pay all damages occasioned by laying out its turnpike road, and by § 7 no entry is to be made upon the land taken until the damages are paid. As to damages for the original taking, there is no provision authorizing the commissioners to issue a warrant of distress. On laying out turnpikes as highways, there is a provision authorizing the commissioners to order towns to refund a portion of the sums paid by the county as damages, and, upon their neglect to refund, to issue process to enforce payment thereof. §§ 19, 20. As to railroads, the provision is that the "damages shall be estimated by the commissioners in the manner provided in the case of laying out highways." § 56. By § 61, the owner of the land may require security for the payment of his damages, and in such case the railroad corporation are not to enter upon the land until such security is given. There is no power directly given to county commissioners to issue a warrant of distress for such damages. This statute, like that in the case before us, provides that the "damages shall be estimated by the commissioners." But neither provides that the payment may be enforced by warrant of distress. Nor was it understood that such authority existed. That power was first conferred by *St.* 1847, *c.* 259.

Neither *c.* 24 nor *c.* 39 of the Rev. Sts. authorizes the commissioners to issue a warrant of distress for damages estimated by them for land originally taken by a location of a highway, turnpike or railroad. Hence neither of these statutes authorizes the issuing of the writ of mandamus prayed for. The enacting of the *St.* of 1847, *c.* 259, giving the remedy by warrant of distress, in case of non-payment of damages for land taken by a railroad, tends strongly to show that no such power was supposed to be previously vested in the county commissioners.

This seems to be hardly controverted; but it is contended that a proper construction of the *St.* of 1855, *c.* 61, will embrace the *St.* of 1847, *c.* 259, § 3, as a part of *c.* 39 of the Rev. Sts. The *St.* of 1847 does not purport on its face to be an act in

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amendment of or supplementary to that chapter, but has reference to various other statutes. Section 3, providing for a warrant of distress against a railroad for non-payment of damages for land taken, introduces a new provision, having its force by virtue of this particular statute, but it cannot be said to incorporate this provision as a part of *c.* 39 of the Rev. Sts.

In confirmation of the view we have taken of the want of any authority to issue a warrant of distress for taking land or water power, to be found in the Rev. Sts., *cc.* 24, 39, we may refer to several special acts creating aqueduct corporations. *Sts.* 1848, *c.* 303; 1850, *c.* 198; 1851, *c.* 213; 1853, *c.* 331. Where these acts confer the power to take land or divert water, they will be found to contain the provision that the corporation shall pay all damages, and that the sum shall be estimated and allowed by the county commissioners as in the case of highways, that is, under the Rev. Sts. *c.* 24. But it was not supposed that this provision would authorize the commissioners to issue warrants of distress against such aqueduct corporations. To give this power to the county commissioners, further legislation was deemed necessary; and the *St.* of 1851, *c.* 289, was enacted, providing that "whenever, upon the application of any person who may have sustained injury from the operations of any aqueduct corporation, in his lands or by the diversion of water, damages shall have been assessed against such corporation by county commissioners, the commissioners may issue warrants of distress to compel payment of such damages, with interest and costs, in the same manner and with the same limitation as they may now do in cases of railroad corporations."

From the fact of the enactment of the *Sts.* of 1847, *c.* 259, § 3, and 1851, *c.* 289, providing by the first for the case of railroads, and in the latter for the case of aqueduct corporations, we think it is to be necessarily inferred that neither *c.* 24 nor *c.* 39 of the Rev. Sts. authorized a warrant of distress to be issued by the commissioners for damages for the original taking of land or water power.

We have already stated that the power found in the *St.* of 1847, *c.* 259, will not avail the petitioners in the present case.

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It only remains to be considered whether the *St.* of 1851, *c.* 289, applies to a case like the present. In terms it certainly does not. The town of Plymouth was not created "an aqueduct corporation." Many such will be found in the special laws, each being an incorporation of sundry individuals, for the special and limited purpose of procuring water and distributing the same, as a joint stock company with the benefits of a corporate name. The present case is more analogous to that of the *St.* of 1846, *c.* 167, entitled "an act for supplying the city of Boston with pure water." The difference between the two statutes is very obvious in this respect; that the act in relation to the city of Boston is prepared with great care, and well adapted to secure fully the rights of all parties, by requiring a description of the lands or other rights taken for the aqueduct to be filed in the proper office, and distinctly providing as to the mode of proceeding to recover the damages any party may sustain. In these respects, this act in relation to the town of Plymouth is certainly defective. But we apprehend that in neither case does the statute create "an aqueduct corporation" in the sense of the *St.* of 1851, *c.* 289. In this view of the case, there is no provision applicable to the present case in that statute.

We are then referred back to *cc.* 24 and 39 of the Rev. Sts. for the authority for issuing a warrant of distress, and the power must be found there; and this is so, assuming that the *St.* of 1855, *c.* 61, gives all the authority in this case, that is given in case of damages in locating highways or railroads. The language of this act ought not perhaps to be overlooked, it being merely "that the same shall be estimated by the county commissioners, in the manner provided in the twenty-fourth and thirty-ninth chapters of the Revised Statutes." It is not said that the payment may be enforced under the provisions of those statutes, but that the price to be paid shall be estimated by the county commissioners in the manner provided in the Rev. Sts. *cc.* 24, 39.

Supposing an assessment of damages has been duly made, the remedy of the Russell Mills is not therefore by warrant of

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distress to be issued by the county commissioners, but by an action of contract. Such was the law as held in *Bigelow* v. *Cambridge & Concord Turnpike*, 7 Mass. 202, where there was no authority for a want of distress or other specific remedy. In *Jeffrey* v. *Blue Hill Turnpike*, 10 Mass. 368, the court say "The statute by which the defendants were made a corporation contains a provision 'that the corporation shall be liable to pay all damages which may arise to any person by taking his land for the road.' The proceedings to inquire of damages and to ascertain the compensation are prescribed; but nothing is said of the legal remedy by which payment is to be enforced against the corporation. This is a case therefore where the common law applies the necessary remedy." This view of the subject precisely meets the present case, and shows that an action of contract is a proper remedy to recover damages that have been estimated by the county commissioners when no express provision for enforcing payment is found in the statute.

The case of *Gedney* v. *Tewksbury*, 3 Mass. 307, was put upon the ground that there was a particular and specific remedy given by *St.* 1786, *c.* 67. The same is true of *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 57. See *St.* 1847, *c.* 259, § 3, above cited. *Mandamus refused.*

E. Ames & W. Whiting, for the petitioners, cited Tapping on Mandamus, 19, 119, 172; *Rex* v. *Robinson*, 2 Bur. 799, & cases cited; *The King* v. *Justices of Middlesex*, 2 Keny. 163; *The King* v. *Justices of Hants*, 1 B. & Ad. 654; *The King* v. *Justices of Buckinghamshire*, 3 Nev. & Man. 68; *Kershaw* v. *Thompson*, 4 Johns. Ch. 612, 613; *Ludlow* v. *Lansing*, Hopk. Ch. 232; *Tremont School District* v. *Clark*, 33 Maine, 482; *Baker* v. *Johnson*, 41 Maine, 15; *Gedney* v. *Tewksbury*, 3 Mass. 309, 310; *Kent* v. *County Commissioners*, 10 Pick. 521; *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 57, 58; *Morse, petitioner*, 18 Pick. 443; 5 Dane Ab. 28; Rev. Sts. *c.* 81, § 5; *c.* 39, §§ 56, 57; *Sts.* 1847, *c.* 259, § 3; 1855, *c.* 61, § 1; Dwarris on Sts. (2d ed.) 569.

B. F. Thomas & C. G. Davis, for the respondents.

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JONATHAN MENDELL & others *vs.* INHABITANTS OF MARION & another.

The *Sts.* of 1849, *c.* 206, and 1851, *c.* 303, forbidding the redistricting of towns into school districts oftener than once in ten years do not prevent towns from abolishing all school districts.

A town which has abolished school districts may purchase the school-houses belonging to the districts, assume all liabilities outstanding against the same, and refund the money paid as school district taxes since such abolition.

PETITION IN EQUITY to restrain the town of Marion and its treasurer from paying money in accordance with a vote of the town. The case was heard and reserved for the full court by *Hoar*, J., upon the petition and answer, which disclosed the following facts:

The town of Marion was incorporated by *St.* 1852, *c.* 225, and was afterwards divided into five school districts. On the 25th of April 1853 the town was again divided into five other districts, with different boundaries. On the 2d of April 1855 the town voted to abolish the school district system and all school districts. On the 14th of April 1856 the town passed a vote to divide the town into three school districts, which was declared illegal by this court at October term 1858. *Blankinship* v. *Hadley*, 11 Gray, 431. On the 27th of August 1859 the town voted to purchase two new school-houses in the town, "and that the town treasurer assume, if practicable, immediately, all the liabilities outstanding against said school-houses, and shall be authorized to receive a deed of the premises from the building committees of said school-houses, and that the town treasurer be directed to refund, with interest thereon, to the persons who have paid the same, all moneys paid into the town treasury as school district taxes that have been assessed as such and collected since the year 1855."

The petitioners contended that the votes of April 2d 1855 and August 27th 1859 were illegal and void.

C. I. Reed, for the petitioners.

B. Sanford, for the respondents.

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Bigelow, C. J. It was determined by this court in *Blankinship* v. *Hadley*, 11 Gray, 431, that the town of Marion was not legally divided into school districts by the vote passed in the year 1856. By the previous action of the town, at a meeting held April 2d 1855, the school districts then existing were abolished; the authority of the town to do this is clearly implied by the provisions of the *Sts.* of 1850, *c.* 286, and 1852, *c.* 199. There is no ground for the position that the prohibition in the *Sts.* of 1849, *c.* 206, and 1851, *c.* 303, to redistrict a town oftener than once in ten years, operates as a restraint on the power of the town to abolish all districts. An authority to destroy or annul cannot be held to be impaired or affected by a restraint imposed only on a power to recreate or rearrange.

There was no illegality or irregularity in the vote of the town authorizing the purchase of the two district school-houses. It was competent for the town to raise money for that purpose, and to expend it in such manner as they might deem expedient and proper. Rev. Sts. *c.* 23, § 24. The provision in the *St.* of 1850, *c.* 286, § 1, authorizing towns to take possession of district school-houses, was intended to confer special authority to act in a particular way, but was not designed to restrict them from purchasing school-houses in any other legal manner.

Petition dismissed.

Samuel H. Howard *vs.* Linus E. Hayward.

Under a declaration on an account annexed containing items for cash, and an answer denying that the defendant received the sums charged or owes them or any part of them to the plaintiff, the defendant may prove that he received the sums charged and applied them, with the consent of the plaintiff, to the extinguishment of debts previously due to him from the plaintiff.

In an action on a promissory note, the defendant filed a declaration in set-off on an account annexed, one of the items in which was for cash. The plaintiff's answer admitted the receipt of the cash, and alleged that it was in part payment of the note and had been indorsed upon it. At the trial it appeared that the defendant had given the note in payment for a lot of wood bought by him of the plaintiff, and the defendant put in evidence a bill of parcels of it, signed by the plaintiff, in which the amount of the price charged was equal to the face of the note, and payment of the whole was acknowledged. *Held*, that the plaintiff might prove that, in a certain contingency, the defendant

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was to pay him an additional sum for the wood, equal to the cash item charged in the account annexed to his declaration in set-off; that the contingency had occurred; and that he had applied the money paid to him by the defendant to the discharge of this additional debt with the defendant's consent; and upon such proof might recover the whole amount of the note.

ACTION OF CONTRACT on a promissory note for $270. The defendant filed a declaration in set-off upon an account annexed, several items of which were for cash. The plaintiff's answer to these items denied that he had received or owed the defendant the sums of money therein alleged, or any part thereof; and averred that the only cash received by the plaintiff of the defendant was the sum of twenty five dollars, mentioned in the ninth item of the account annexed to the declaration in set-off, and that he received this in part payment of the note and indorsed it thereon.

At the trial in the superior court, before *Ames*, J., it appeared in evidence that the plaintiff had received of the defendant the sums of money charged in the account annexed; and the plaintiff thereupon offered evidence that these sums had been applied, with the defendant's consent, to the payment of other demands of his against the defendant. The defendant objected to this evidence, on the ground that the plaintiff had not pleaded any such appropriation, but had put in issue merely the receipt of the money. But the judge overruled the objection, and ruled "that under the pleadings the plaintiff might show that any item of cash charged was in fact paid and received on some other and previous claim."

There was also evidence that the note in suit was given, together with five dollars in money, in payment for a lot of wood and timber; and the defendant produced and proved the following writing: "West Bridgewater, January 1st 1859. L. E. Hayward bought of Samuel H. Howard one lot of wood and timber, $275. Received payment by note and cash,

"Samuel H. Howard."

The plaintiff offered oral evidence that it was a part of the bargain that, upon a certain contingency, the defendant was to pay him for this wood and timber the additional sum of twenty five dollars; that the contingency had occurred; and that the

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money charged in the ninth item of the account annexed to the declaration in set-off had been appropriated, with the knowledge and consent of the defendant, to the payment of this sum of twenty five dollars. The defendant objected to the admission of this evidence, on the ground that the contract, both as to price and payment, was in writing, and could not be controlled by oral evidence. This objection also was overruled and the evidence admitted.

The judge instructed the jury that if the money claimed in the declaration in set-off had been paid by the defendant and applied by the plaintiff to the payments of other demands of his against the defendant, no allowance should be made for it to the defendant in set-off against the note in suit. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. E. Carpenter, for the defendant.

J. White, for the plaintiff.

Merrick, J. The statute provides that declarations in set-off, and all the subsequent allegations respecting the same, shall be governed by the rules prescribed and made applicable to an action brought for the same cause. *St.* 1852, *c.* 312, § 37. One of these rules is, that any substantive fact, alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted. § 26. The only fact, in a declaration upon an account annexed, which can be said to be alleged with such precision and certainty is, that the defendant owes the several sums of money stated in the different items of the account. Accordingly, upon a plain and distinct denial of such indebtedness, none of those items can be deemed to be admitted; but to maintain his action the plaintiff must prove the allegation in the declaration, that the defendant owes him the whole or some part of the items stated in the account. The evidence which he produces for the purpose, and in support of the different items in the account, may be controverted by the defendant. So that upon the trial, while the plaintiff may introduce any competent evidence to prove a special or implied promise by

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the defendant to pay the several sums of money charged in the account, the latter may also produce any competent evidence tending to show that he never made such promise, and was never under any obligation to pay any part of the claim made against him. Thus in the present case, in respect to the several sums of money charged in the account, it may be shown in support of the action that they were received by the plaintiff of the defendant; and proof of this fact will afford a presumption of indebtedness, which, if unexplained, is sufficient to entitle the defendant to a verdict for the amount thus received. But this is only evidence tending to establish the fact of the alleged indebtedness. It is by no means conclusive. The plaintiff may therefore repel it, and show in reply that, although the money was actually received by him, he did not thereby become a debtor to the defendant or promise to repay it to him. And if he should thus show that it was both paid and received in discharge and satisfaction of his own claim and demand, this would directly sustain his denial and disprove the allegation of indebtedness set forth in the defendant's declaration. Such evidence was admissible to explain and control the presumption that he owed the money, arising from the fact that he received it, and would show that it was not lent to him, nor received to the defendant's use, nor for any cause requiring the amount of it to be repaid.

The rule under which such evidence can be received is limited to the case in which the party attempted to be charged and held responsible insists and contends, under the denial in his answer, that he was never indebted at all, and never incurred any liability or was under any obligation to pay anything on account of the several sums of money alleged to be due from him. If such an indebtedness or liability once existed, and the defendant in an action brought to recover the amount claimed to be due from him would rely in his defence upon any matter showing that he had been in some manner released or discharged from it, and that his obligation to pay or to perform his promise could not for that reason or cause be legally enforced against him, it must be clearly and distinctly set forth in his

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answer; otherwise he cannot be allowed to avail himself of it. This is the principle upon which all the cases cited at the argument were decided. Thus where the defendant relied upon payment, upon the illegality of the contract declared on, the incapacity of a plaintiff corporation to maintain an action because it was not duly organized, or the misrepresentations of the insured in his application for insurance, it was held that no evidence could be received in support of the proposed defence, unless the special matter offered to be proved were clearly set forth and specified in the answer. *Granger* v. *Ilsly*, 2 Gray, 521. *Bradford* v. *Tinkham*, 6 Gray, 494. *Williams* v. *Cheeny*, 3 Gray, 220. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541. *Haskins* v. *Hamilton Mutual Ins. Co.* 5 Gray, 432. *Canfield* v. *Miller*, 13 Gray, 274. Release, accord and satisfaction, and other matters of avoidance or discharge, fall within the same rule.

But the evidence which in this case was offered by the plaintiff, and to the admission of which exception was taken, tended directly to disprove the allegations in the declaration in set-off, as well as to sustain the denial of indebtedness contained in the answer. And it was just as admissible in relation to the ninth as to the fourth and seventh items in the account. The object and purpose of the plaintiff, in offering the proof objected to in reference to that item, was not to vary, change, contradict or control any written contract, but to show that the money there charged was received by him and paid by the defendant on a claim which was, at the time when the money was so received, assented to on the one side, and acquiesced in on the other. That was sufficient to show that the receipt of the money created no indebtedness, and could not be made the basis of an action for its recovery. The instructions to the jury were in conformity with the principle upon which the ruling respecting the admission of the evidence was made, and both were correct. *Exceptions overruled.*

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Ezra Whitmarsh & another *vs.* Conway Fire Insurance Company.

A policy of insurance on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder;" founded on an application which is made a part thereof, which states the property to be "the stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, except dry goods;" and declaring that if certain articles denominated hazardous, extra-hazardous, and risks prohibited, enumerated therein, are kept in any premises insured, the policy shall be void, unless therein otherwise specially provided for; is not avoided by the keeping of some of these articles, if they are articles usually kept for sale in a "country store;" and parol evidence is admissible to prove this.

Evidence is admissible of a well settled custom by which the words "store fixtures" in a policy of insurance are applied to all furniture and other articles in a shop or warehouse, necessary or convenient for use in the course of trade.

Action of contract upon a policy of insurance to the plaintiffs "on their stock in trade, consisting of the usual variety of a country store (except dry goods) and on their store fixtures, all contained in the wood building with brick basement, occupied by the assured, situated in East Bridgewater, Mass. Permission to keep and sell burning fluid and gunpowder, as per application." "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous, or specified in the memorandum of special rates, or of risks prohibited, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandise, in the same terms and conditions denominated hazardous or extra-hazardous, or included in the memorandum of special rates or of risks prohibited, unless herein otherwise specially provided for, or hereafter agreed by this company in writing and added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease and be of no force or effect. And it is moreover declared

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that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for; and no condition can be waived except in writing signed by the secretary."

Annexed to the policy were five classes of hazards, denominated respectively "not hazardous," "hazardous," "extra-hazardous," "memorandum of hazards which will be insured at special rates of premium," and a memorandum of hazards "prohibited and not to be insured at any rate of premium." Among the "trades and occupations, goods, wares and merchandise" denominated extra-hazardous were "burning fluid" and "earthen or glass ware;" in the memorandum of hazards to be insured at special rates of premium was included "oil;" and in the memorandum of articles not to be insured at any rate of premium were "gunpowder," "friction matches and match shops."

Among the conditions annexed to the policy were the following: "Applications for insurance must specify," "in case of goods or merchandise, whether or not they are of the description denominated hazardous or extra-hazardous, or included in the memorandum of special rates. And a false description by the insured, of a building or of its contents, or any misrepresentation or concealment, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or in a valued policy, an over-valuation, shall render absolutely void a policy issuing upon such description or valuation. And if any application or survey, plan or description, of the property herein insured is referred to in this policy, such application or survey, plan or description, shall be deemed and taken to be a warranty on the part of the assured."

The application, which was expressly made a part of this policy and warranty on the part of the assured, requested insurance "on stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, with the fixtures of the same, except dry goods;" and in answer to the interrogatory, "Is there any other fact or circumstance affecting

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the risk?" stated, "Applicants want permission to use and sell burning fluid, and also to retail gunpowder, to be sold only in the daytime."

At the trial in the superior court, before *Russell*, J., it was admitted that the plaintiffs, at the time of the making of the contract of insurance and during the existence of the policy, and at the time of the fire, kept for sale in their shop, as a part of their usual stock in trade, whale oil, friction matches, and earthen and glass ware. The plaintiffs offered evidence that all these were articles usually kept in "country stores," and so were embraced in the terms of the policy. But the judge excluded the evidence, and ruled that keeping these things for sale had avoided the policy.

The plaintiffs, under the head of "store fixtures," claimed to recover for the loss of certain tools, implements, and furniture, not affixed to or forming part of the building; and offered evidence of a well settled custom among underwriters and the community generally by which the terms "fixtures" and "store fixtures" were used in insurance to denote all the movable articles of shops and warehouses which are convenient or necessary for use in the course of trade; and that these articles were of the kind usually known and called by that name. The defendants objected that they were not fixtures within the well settled legal definition of the term, and that therefore the plaintiff could not recover for the same; and the judge so ruled, and excluded the evidence. The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions.

B. W. Harris, for the plaintiffs.

S. O. Lamb, for the defendants, cited *Lee* v. *Howard Fire Ins. Co.* 3 Gray, 583; *Macomber* v. *Howard Fire Ins. Co.* 7 Gray, 257; *The Reeside*, 2 Sumner, 567; *Richardson* v. *Copeland*, 6 Gray, 536; *Eaton* v. *Smith*, 20 Pick. 150; 1 Greenl. Ev. §§ 277, 280, 292; 2 Greenl. Ev. § 251; 2 Parsons on Con. 63.

CHAPMAN, J. The words of a written contract are the sole expositors of its meaning, except so far as they refer to something without the instrument. If another document is referred to — if, for example, a policy of insurance refers to an applica-

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tion or survey, or to by-laws or regulations — the document referred to is to be construed in connection with the contract, and as a part of it, so far as the reference makes it such. If a custom or usage is referred to, the custom or usage is to be ascertained as in other cases by the proper evidence. If a term of art or trade is used in the contract, having a peculiar signification among persons conversant with the art or trade, the testimony of such persons becomes proper evidence to prove the meaning. These principles are to be applied to policies of insurance in the same manner as to other contracts.

Taking then the policy before us, we find in the printed form a provision referring to certain lists of property which are classed as hazardous, extra-hazardous, special rates, and not insurable; and the keeping of these articles in a building insured renders the policy void, "unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy." Turning to the description of property insured, we find it to be "their stock in trade, consisting of the usual variety of a country store (except dry goods) and on their store fixtures." The usual variety of a country store is thus provided for in the policy, and the defendants agree to insure it. But what such usual variety is can only be ascertained by parol evidence. We do not think that this construction of the language of the policy is changed by the special permission to keep burning fluid and gunpowder.

If then the plaintiffs can prove that oil, friction matches, earthen ware and glass ware, in such quantities as they kept them, compose a part of the usual variety of a country store, they have not violated their policy by keeping those articles. *Elliott* v. *Hamilton Mutual Ins. Co.* 13 Gray, 139. The parol evidence offered on this subject was pertinent and ought to have been admitted. So if the term "store fixtures" is a term of trade, commonly used among traders and insurers, and is used in such a signification as to include any or all the articles mentioned as such in the report, those were insured by this policy. The parol evidence offered on this subject was proper and ought to have been admitted.

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The case of *Lee* v. *Howard Fire Ins. Co.* 3 Gray, 583, cited by the defendants' counsel, differed from the present case in this respect, that there was nothing in the description of the articles insured that could, either directly or by reference, include a grist-mill. The cases of *Macomber* v. *Howard Fire Ins. Co.* 7 Gray, 257, and *Witherell* v. *City Fire Ins. Co. ante*, 276, differed from this in making no mention of the usual practice, which these plaintiffs offered to prove.

Exceptions sustained.

ZACCHEUS ESTES *vs.* JOSEPH WILKES, Administrator.

The giving of notice of the appointment of an executor or administrator, required by the Rev. Sts. c. 66, in order to make the period of limitation of actions of creditors against him begin to run from the time of his giving bond, may be proved by other evidence, as well as by an affidavit filed in the probate office.

ACTION OF CONTRACT brought on the 23d of September 1858 on a promissory note made by the defendant's intestate to the plaintiff on the 24th of September 1852, and payable on demand. Answer, the special statute of limitation of actions against executors and administrators.

The parties submitted to the judgment of the court the following case: The defendant was appointed administrator and gave bond as such on the 15th of May 1854; and can prove (if competent, which the plaintiff denies,) that within three months from that day he duly posted proper and sufficient notices of his appointment in two or more public places in the town where the intestate last dwelt; but no affidavit of having given or posted such notices was ever made to the probate court or filed in the probate office.

P. Simmons, for the plaintiff. By the Rev. Sts. c. 66, § 25, if, by reason of any accident or mistake, notice shall not be given of the appointment of any executor or administrator within three months after giving bond, "or the evidence thereof shall fail to be perpetuated as herein before provided," (namely, by affidavit filed in the probate office as required by § 2,) he

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may be ordered and allowed by the judge of probate upon his petition to give such notice at any time afterwards, "in which case" (that is to say, in case of failure so to perpetuate evidence,) the time limited for the commencement of actions by creditors against him "shall begin to run from the time of passing such order." The commencement of the period of limitation is thus made to depend on giving notice of the appointment and perpetuating the evidence thereof.

E. Ames, for the defendant. By the Rev. Sts. *c.* 66, § 3, "no executor or administrator, after having giving notice of his appointment as prescribed in the first section, shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four" (reduced by *St.* 1852, *c.* 294, § 1, to two) "years from the time of his giving bond," except in certain cases of which this is not one. The special mode of proving the giving of notice, allowed by § 2, does not exclude proof by evidence competent at common law. As the administrator has not applied for a new order of notice, § 25 has no application.

THE COURT gave *Judgment for the defendant.*

BENJAMIN CAPEN & others *vs.* INHABITANTS OF STOUGHTON.

If a sheriff's jury summoned to assess damages for the laying out of a town way, after agreeing upon a verdict for one party, sign, seal up and return into court one for the other, through mistake; and this verdict is accepted by the court on motion of the counsel of the first party, made after being informed that it was said by the jury to be in his favor and without examining the verdict itself; the court has power, at a subsequent term, upon petition, before any action has been taken on the judgment, to bring the case forward and vacate or amend the judgment; and the jurors are competent witnesses to prove the mistake.

PETITION entered at April term 1858 of the court of common pleas in Norfolk, setting forth that in November 1856 a town way was laid out over the land of the petitioners in Stoughton, and damages assessed therefor, by which the petitioners were aggrieved, and the county commissioners, upon their application and after due notice, issued a warrant for a

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reassessment of the damages by a jury; that a jury was impanelled and the case tried before them; that blank forms of verdict for the petitioners and for the respondents were handed to them by the sheriff; that the jury agreed upon and filled out a verdict for the petitioners, but through mistake omitted to sign it, and signed a verdict for the respondents; that both verdicts were sealed up in one envelope and returned into the court of common pleas; that the petitioners received information from some of the jurors that the verdict returned was in their favor, and so told their counsel, and he, relying on this information, without inspecting the verdict, moved the court at December term 1857 to accept it, and it was accepted and ordered to be certified to the county commissioners. The prayer of the petition was that this judgment should be vacated, the case brought forward on the docket, and leave given the petitioners to sue out a writ of review.

Sanger, J. ruled that, assuming all the facts stated in the petition to be true, the petitioners were not legally entitled to the relief prayed for, and the court had no discretionary power to grant it; and dismissed the petition. The petitioners alleged exceptions, which were argued in January 1859.

E. Ames, for the petitioners.

E. Wilkinson, for the respondents.

Bigelow, J. If the facts stated in the petition are true, it is clear that the order of the court of common pleas, accepting the verdict of the jury and ordering it to be certified to the county commissioners, was improvidently made through the mistake of counsel, and that very great injustice would be done if the error could not be in some way corrected.

We think it equally clear that the court had power at a subsequent term, in the exercise of a judicial discretion, on satisfactory proof that an erroneous entry had been made on the docket through mistake, to order the case to be brought forward for the purpose of vacating the previous erroneous order, and making such disposition of the case as the rights of the parties might require. When no action has been taken on an order or judgment, and the rights of parties to the proceeding

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or those of third persons cannot be affected unjustly by the correction of an error, the court has power to order an action to be brought forward and a judgment to be vacated, in order that an entry may be made in conformity with the truth. This was distinctly settled in *Stickney* v. *Davis*, 17 Pick. 169. The court erred therefore in ruling that it had no power to grant relief to the petitioners. *Exceptions sustained, and case remitted.*

A hearing was had in the court of common pleas at April term 1859, at which *Aiken*, J., against the objection of the respondents, allowed three of the persons who had composed the sheriff's jury to testify that, after agreeing on a verdict for the petitioners and filling up a blank form accordingly, the jury by mistake signed the form of verdict for the respondents; and ordered the former case to be brought forward on the docket, and the acceptance of the verdict to be vacated as prayed for. The respondents alleged exceptions to the admission of the testimony of the jurors.

W. Colburn, for the respondents, cited *Chadbourn* v. *Franklin*, 5 Gray, 312; *Ex parte Caykendoll*, 6 Cow. 53; *Haight* v. *Turner*, 21 Conn. 593; *Jackson* v. *Williamson*, 2 T. R. 281; *Folsom* v. *Brawn*, 5 Foster, 114; *Murdock* v. *Sumner*, 22 Pick. 156; *Cook* v. *Castner*, 9 Cush. 266; *Folsom* v. *Manchester*, 11 Cush. 334; *Clum* v. *Smith*, 5 Hill, 560.

Ames, for the petitioners.

Bigelow, C. J. We think this case differs essentially from those cited by the counsel for the respondents, in which it has been held, that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity or misconduct of the jury, or of some one or more of the panel. It has been settled upon sound considerations of public policy that mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the jury room, cannot be shown by the evidence of the jurors themselves, as the ground of disturbing a verdict, duly rendered. *Chadbourn* v.

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Franklin, 5 Gray, 315, and cases there cited. One of the strongest cases on this point in the English books is *Bridgewood* v. *Wynn*, 1 Har. & Wol. 574. In all those cases, however, it will be found upon examination, that an inquiry was attempted into the conduct of jurors during the progress of the trial, or while they were engaged in their deliberations upon the case, or in making up the verdict to which they finally agreed. But in the present case the mistake which is proved by the testimony of the jurors is of a different character. It is not one connected with the consultations of the jury, or the mode in which the verdicts were arrived at or made up. No fact or circumstance is offered to be proved, which occurred prior to the determination of the case by the jury and their final agreement on the verdict which was to be rendered by them. But the evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased, and they had actually agreed on their verdict. The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived.

The case of *Cogan* v. *Ebden*, 1 Bur. 383, and 2 Keny. 24, is quite analogous to the present. There two different issues were joined as to a right of way over two separate closes. The foreman of the jury gave in the verdict as a general verdict for the defendant on both issues. The court received the affidavits of eight of the jurors, which were uncontradicted, "that it was the meaning and intention of the whole jury to find the former issue for the defendant and the latter for the plaintiff, and that this mistake was discovered by them an hour afterwards." On this evidence the court held that this "was a mistake arising from the jury's being unacquainted with business of this nature; and that it was agreeable to right and justice that the mistake should be rectified."

No considerations of public policy require that the uncontradicted testimony of jurors to establish an error of this nature

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should be excluded. Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove dangerous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake, of a merely formal and clerical character, which the court ought to interfere to correct, in order to prevent the rights of parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case. *Order affirmed.*

HENRY DOANE *vs.* THOMAS WILLCUTT.

In an action for trespass upon land, the plaintiff traced his title to two persons as tenants in common, and gave in evidence a deed of partition of the premises between them, in which a third person was named as a former owner. *Held*, that a previous deed of the premises to that person, and acts of ownership exercised by him, were inadmissible in evidence for the defendant, in the absence of proof of any privity of title between that person and the tenants in common.

A party to an indenture of partition, containing a full and accurate description of the land, and a recital that it has been set off to a widow as dower, is not thereby estopped to show that land held by him under a lease from the widow of all the premises set off to her as dower is different land.

ACTION OF TORT for trespass on the plaintiff's close. Trial and verdict for the plaintiff in the court of common pleas at April term 1858 before *Perkins*, J., to whose rulings the defendant alleged exceptions. The case is stated in the opinion.

C. A. Welch & E. Avery, for the defendant.

W. Colburn, (*J. J. Clarke* with him,) for the plaintiff.

MERRICK, J. This case has been before the court upon a former bill of exceptions. It was then determined that the recital in the deed of indenture, made in April 1833 by and between the plaintiff and his wife, the defendant and his wife, and sundry other persons, that they were seised in fee of

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the premises described in the writ as tenants in common, did not estop the plaintiff from asserting and maintaining by proof that at the time of said partition there was an outstanding and paramount title, superior to that of either of these parties, which he had subsequently acquired, and by virtue of which he claimed to be the owner and rightful occupant of the estate. *Doane* v. *Wilcutt*, 5 Gray, 328. It is not stated in the present bill of exceptions, but it was conceded at the argument upon the questions of law presented in it, that upon the trial of the action the plaintiff did, after the defendant had put that indenture in evidence, produce evidence on his part tending to show some such outstanding paramount title in a third party when the indenture was executed; that he subsequently acquired it, and thenceforward held, and still claims to own and hold, the premises under and by virtue of it. This concession is indispensable to show the materiality of the rulings of the court in rejecting the deed offered in evidence by the defendant, and thus to render the bill of exceptions intelligible.

1. It was to contest and counteract the effect of the proof which the plaintiff had produced concerning the paramount title outstanding in a third party when the indenture was made, that the defendant undertook to show a still older paper title, and possession and acts of ownership under it, and to trace it in an unbroken line, by conveyances and by descent and inheritance, from Jeremiah Beale in 1684 to himself in 1833. From the deeds introduced by him on the trial for this purpose, it appears that on the 6th of June 1760 Philip James and Thomas James were seised in fee of the premises and of other lands undivided as tenants in common; and that by a deed of partition of that date, by them duly executed, the premises therein described as "an island commonly known as James's Island, at the place called the Beach Islands in the township of Hingham, formerly granted to Francis James," were granted, transferred and assigned in severalty to Thomas James. The defendant, having proved these facts, offered to give in evidence the record of a mortgage deed from Francis James to John Clark and others, commissioners

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for the Province of Massachusetts, dated February 13th 1716, insisting that it was admissible as evidence of an act and claim of Francis James upon and over said estate. But this deed was rejected; and very properly, because there was no evidence before the court to show any privity of estate between Thomas James and Francis James, or that the former derived a title to the premises in any manner from the latter. It was claimed that it was so derived by inheritance, the defendant asserting that Francis was the uncle of Philip and Thomas. But of this there was no proof, nor any evidence tending to prove it. The bill of exceptions states that the only evidence of relationship between those parties was to be found in the partition deed of 1760, where it is said that the island was "formerly granted to Francis James." This description is just as consistent with the supposition that he was an entire stranger in the family of Philip and Thomas as that he was their uncle. But even if that fact could be assumed, proof is still entirely wanting to show that they were his heirs at law. Taking the facts just as they are stated in the bill of exceptions, nothing is found to justify the mere assumption of the defendant, either that he was their uncle, or that they were his heirs at law and became entitled to his estate upon his decease. Indeed it may be said still further, that there is no evidence in the case to show that he left any estate to be inherited by anybody. As there was, therefore, an entire failure of proof of any privity in estate between Philip and Thomas James, and Francis James, it is obvious that his deed to Clark and others, commissioners, either for the purpose of showing an act of possession or of claim to the estate, or for any other purpose, was clearly inadmissible. That was the act of a party with whom the plaintiff failed to show that he, or the title which he attempted to set up, had any connection.

For the same reason, the deed of Jeremiah Beale to Philip James of the 12th of June 1684 was inadmissible. It was useless to show that the title which he had to the estate was regularly transmitted by proper intermediate conveyances to Francis James, since the chain of title is at that point broken,

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or at any rate is not shown to have extended further in a direction towards the defendant. As he could not, or did not, show any privity of estate, or any connection whatever between himself and Francis James, it was, of course, wholly immaterial to the questions at issue in this suit to ascertain in what manner he acquired, or how or to whom he disposed of, the estate of which he was the owner.

2. But besides relying on the outstanding paramount title, which he had purchased and caused to be conveyed to himself, the plaintiff also contended that he had acquired a full and complete title to the premises by adverse occupation and possession for a period of more than twenty years. And this claim he attempted to support by proof of the alleged facts. On the other hand, to explain the nature and character of the plaintiff's possession, and to show that it was not adverse, the defendant, in addition to the indenture of 1833, introduced in evidence a lease to him from Elizabeth Nichols, the widow of Lot Nichols, of all the land which had been set off and assigned to her as dower on the estate of her deceased husband. It thereupon became necessary to resort to the record of the assignment of dower to Mrs. Nichols to ascertain what estate was demised by the lease; and from that record, which was produced in evidence by the plaintiff, it appeared that the said premises constituted no part of it. But the defendant objected, that this record was inadmissible, on the ground that the plaintiff was estopped by the recital in the indenture that the land therein mentioned, and of which partition was thereby made, had been set off as dower to the widow of Lot Nichols. This recital however is plainly only a part of the description of the estate upon which the deed was intended to operate, and which is therein otherwise fully and accurately described. The doctrine of estoppel is not applicable to such a case. Where several particulars are mentioned and referred to in the description of land conveyed, some of which are found to be erroneous, these may be rejected as a false demonstration, and the other parts of the description, which are unambiguous and correct, must be relied on to fix and determine the rights of the parties

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under the deed. 1 Greenl. Ev. § 26. *Wright* v. *Tukey*, 3 Cush. 299. Thus, where a grantor in a deed conveyed a tract of land, describing it by metes and bounds, and adding, "being all and the same land which Benedict Dewey, deceased, lately owned in a hundred acre pitch," &c., it was held that this was a conveyance of the land described by metes and bounds, and not merely of that to which Dewey had title. *Whiting* v. *Dewey*, 15 Pick. 428. The same rule was held in the subsequent cases of *Winn* v. *Cabot*, 18 Pick. 553, and *Thatcher* v. *Howland*, 2 Met. 41. It was for a similar purpose that the record of the assignment of dower to Mrs. Nichols was offered by the plaintiff, and it was therefore properly allowed to be given in evidence. *Exceptions overruled.*

Amos W. Stetson *vs.* Charles H. Dow.

The owner of a tract of land conveyed a portion of it, described as bounded in part on "an avenue laid out on a plan" of the whole tract, previously made for the grantor by a certain surveyor; "meaning and intending to convey to the grantee all the land laid out as said avenue, so far as the same is connected with or contiguous to the land above described; and if the said avenue is finally opened, as laid out on said plan, by the agreement of the owners of all the land, then the same is to be open and free to all the abutters thereon from Adams to Elm Streets." *Held*, that the fee thus granted in the soil of the way was subject to a right of way in the grantor and his assigns as appurtenant to the rest of the tract. *Held, also*, that the way might be identified by the testimony of another surveyor, that shortly before the deed the grantor handed him the plan made by the first surveyor, on which he marked out lots and an avenue in pencil, and caused a number of copies thereof to be lithographed, one of which he produced.

When a bill of exceptions shows that the prevailing party at the trial put in a deed, which by its true construction is conclusive in his favor, the admission of oral evidence of subsequent acts is immaterial and no ground of exception.

Merrick, J. This is an action of tort to recover compensation of the defendant for the damage caused by his forcibly entering upon and ploughing up the soil of the plaintiff's close. The defendant in his answer sets forth and avers that, at the time of the doing of the several acts stated and complained of in the declaration, he had and was the owner of a right of way in a certain part of said close; and that all he did upon it,

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either by ploughing or otherwise using or disturbing the soil thereof, was for the sole purpose of fitting and preparing the way in a suitable and proper manner for the use and enjoyment of it. And it is conceded that if he did in fact own and was legally entitled to have and enjoy the alleged right of way, his entry and acts upon the close were justifiable, and afford to the plaintiff no just ground of complaint or cause of action.

Several questions of law are presented to the consideration of the court in the bill of exceptions; but upon examination it is very obvious, from the statement of the case, that the rights of the parties in relation to the matter in controversy between them are to be determined upon a proper construction of the deeds under which they respectively claim to derive title to an interest in the "avenue" mentioned in them.

By the deed of Stetson and Newcomb, assignees of Benjamin V. French, two lots of land are conveyed to the plaintiff, the first of which is described in part as bounding on "an avenue laid out on a plan of lands of the Hon. B. V. French, made by Lemuel Humphrey, October 17th 1849." The other tract conveyed is described as bounding in part "by said avenue."

It is now well settled that when a grantor conveys land bounding on a street or way, he and his heirs are estopped to deny the existence of such street or way; and the grantee acquires by the deed a perpetual easement or right of passage on, upon and over it, from the full enjoyment of which he can never afterwards be excluded. And this is a right, not only coextensive with the land conveyed, but for the entire distance of the way, as it is then actually laid out or clearly indicated and prescribed. *Tufts* v. *Charlestown*, 2 Gray, 271. *Thomas* v. *Poole*, 7 Gray, 83. *Loring* v. *Otis*, 7 Gray, 563. *Rodgers* v. *Parker*, 9 Gray, 445. The plaintiff therefore by his deed acquired a right of way in the avenue as it was laid out in the aforementioned plan made by Humphrey; and on recurring to the plan and the statements on the bill of exceptions, it appears that this avenue extends from Adams Street by or over

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the lands conveyed to the plaintiff to the lands subsequently conveyed to the defendant, and thence by the last mentioned tracts of land to Elm Street. The right of way, therefore, which the plaintiff acquired, extended the entire distance from Adams to Elm Street.

It became of course necessary, in applying this description to the land in question, to ascertain what avenue was in fact laid down on the plan made by Humphrey. This was fully disclosed by the evidence produced upon the trial, which was clearly admissible for that purpose. *Allen* v. *Bates*, 6 Pick. 460. *Waterman* v. *Johnson*, 13 Pick. 261. Breck, a surveyor, testified that before the sale the plan of Humphrey was put into his hands by the assignees of French, who were the plaintiff's grantors, and that by their direction, after having made some additional surveys, he marked out upon it the lots and avenue in pencil. That was the laying out of the avenue on the plan of Humphrey, mentioned in the deed. The plan thus amended and prepared was sent to the lithographers, who returned one hundred copies of it, of which the plan produced in evidence upon the trial is one. This latter plan therefore shows exactly of what the avenue consisted, and consequently what and where was the right of way to which the plaintiff became entitled by the conveyance.

But there is a further clause in the same deed, by virtue of which the plaintiff claims to have acquired, not only a right of way in the avenue, so far as it is coextensive with the land conveyed to him, but also an absolute title thereto in fee to the exclusion of the grantors and of all persons claiming title under them to lands bounding on any other part of the avenue. It is in these words: "Meaning and intending to convey to the said Amos W. Stetson all the land laid out as said avenue, so far as the same is connected with or contiguous to the said land above described. And if the said avenue is finally opened or laid out on said plan, by the agreement of the owners of all the land, then the same is to be open and free to all the abutters thereon from Adams to Elm Streets." This clause distinctly recognizes the existence of the avenue laid

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down on the plan of Humphrey, that is, laid down by Breck, by the direction of the assignees of French on the plan which had been previously made by Humphrey. The only legal effect of it is a conveyance of the land of which the avenue consists in fee to the grantee, but subject to a right of way upon and over it. The avenue continues in existence, and the easement created upon it is in no respect abrogated or discharged. The grantee, notwithstanding this clause, derives a right of way beyond his land, extending as far as Elm Street, while at the same time that which is conveyed to him is subject to a like burden for the benefit of the owners and proprietors of the other adjoining lots through which it passes. The provision that the avenue shall be open and free to all the abutters when it is finally opened by the agreement of all the owners of the land is merely superfluous. They certainly could agree upon a way if none existed or was created before. The conclusion from these circumstances is, that the plaintiff acquired by this deed the fee of the land of which the avenue consisted, but subject to the right of the grantors, as owners of other land bounding on it, to have a like right of way with him over and upon it.

Such being the condition of the estates and the title of the respective parties owning lands bounding on the avenue, the assignees of French had undoubtedly both the power and the right to convey a right of way in it to the defendant, together with the lots described in the deed subsequently made to him. And this was done; for it is a part of the description of the lots conveyed that they bounded on the avenue, and this, as has already been shown, necessarily imported not only that the grantors had such right of way themselves, but also that they conveyed it to the defendant.

The parol evidence of what took place at the auction sale, having plainly been produced and admitted for the purpose of showing what interest and estate was conveyed by the deeds to the parties in this action, was manifestly inadmissible. But this, as well as the several other questions arising upon the bill of exceptions, must now, in reference to the verdict which was

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rendered for the defendant, be considered as wholly immaterial. As he had and owned under his deed the right of way which he claimed, no parol or other evidence was necessary to enable him to insist upon or to avail himself of it. As a mere question of law, upon a proper construction of the terms contained in the two deeds to the plaintiff and the defendant, the latter, upon the concession that he did upon the land no other acts than those which were necessary and proper to fit and prepare the surface of the avenue for use as a way, was guilty of no wrong, and no action can be maintained against him.

Exceptions overruled.

E. Avery, for the plaintiff.

E. Ames, for the defendant.

Laban S. Beecher *vs.* Miles Mayall & others.

If a contract of sale of personal property, under which it has been delivered to the buyer, is rescinded by agreement of the parties, and the buyer retains possession for the purpose of repairing the property for the seller, no further act is necessary to revest the title in the seller.

In a controversy between two concerning the title to personal property, conversations between one of them and third persons, who are referred by the other to him as the owner, are not admissible in his favor.

Action of tort for the conversion of two steam boilers. At the trial in the court of common pleas at December term 1858, before *Morris*, J., the plaintiff offered evidence tending to show property in himself in 1850, and a conversion by the defendants.

The plaintiff upon cross-examination testified that in 1851 he agreed with one Sherman, then in partnership with the defendant Mayall, to sell, and did sell to the firm the two boilers, together with other property, for five hundred dollars; that all the property was thereupon taken possession of by the firm and removed to their machine shop; but before any bill of sale was made, or any part of the price paid, Sherman came to the plaintiff again, stated that Mayall was dissatisfied with the bar-

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gain, and asked that it should be cancelled, to which the plaintiff consented, and the plaintiff and Sherman then agreed that Sherman & Mayall should repair the two boilers and a steam engine for the plaintiff, and retain as compensation therefor the other articles included in the original sale.

The plaintiff also introduced evidence that Mayall afterwards referred several persons, who applied to him to purchase the boilers, to the plaintiff as the owner of them. The plaintiff offered evidence that these same persons afterwards applied to him as the owner of the boilers and desired to purchase them; but this evidence was rejected.

The defendants claimed title under the sale above mentioned, and contended that the subsequent rescission and agreement for repairs did not operate to revest the property in the plaintiff, for want of a redelivery. The plaintiff contended "that the rescission and agreement were sufficient to revest the property in him, if such was the intention of the parties, and it was contemplated by neither of them that any further act should be done to perfect the transfer."

The judge instructed the jury, "that if the sale from the plaintiff to Sherman & Mayall was perfected by a delivery, then the property passed, and the contract, being executed, could not, properly speaking, be rescinded by the parties; but that if the agreement subsequently made between the plaintiff and Sherman, although denominated by them a rescission, was virtually an agreement to retransfer the property to the plaintiff, and so intended by them, then, by whatever name called, it would, in its legal effect, be a resale; but that, in order to such effect, the same legal requisites were necessary as in the original sale from the plaintiff to them; that one of these requisites was delivery, either actual or constructive; that slight evidence of delivery would be sufficient, particularly in property of this description; and that the jury might presume such delivery from subsequent acts of control and possession on the part of the plaintiff, if proved; that if, by the agreement of the plaintiff and Sherman, the boilers were not to be the plaintiff's property until they had been repaired and put in order, then until that

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had been done the property would remain in Sherman & Mayall; otherwise, the property would pass immediately, if such was the intent of the parties." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

W. Gaston & J. W. May, for the plaintiff.

W. L. Burt, for the defendants.

DEWEY, J. If the jury found the facts to be such as are stated in the bill of exceptions, as the evidence of a sale to Sherman & Mayall, and a resale, on surrendering to the plaintiff all the rights acquired by the original contract of sale, any further evidence of delivery, by subsequent acts of the parties, was unnecessary. If upon the resale it was stipulated that Sherman & Mayall were to proceed to repair the property, and were to have the possession for that purpose merely, their possession would be the possession of the plaintiff. The instruction asked by the plaintiff upon this point was substantially correct.

The ruling of the court, as given to the jury, although perhaps not so intended, was stated with such additional qualifications and requirements as would naturally lead the jury to suppose something more to be necessary, beyond the facts which it is stated the evidence tended to prove, to authorize them to find a valid transfer of the property to the plaintiff, divested of all the rights to the same acquired by Sherman & Mayall by the sale to them. Thus the instructions "that slight evidence of delivery would be sufficient," and "that the jury might presume such delivery from subsequent acts of control and possession on the part of the plaintiff, if proved," assumed that something was necessary to be shown, beyond the contract to give up the sale and retransfer the property to the plaintiffs and keep the possession of the same for the purpose of making repairs in pursuance of the condition of the resale to the plaintiff.

For these reasons, the court are of opinion that the verdict should be set aside and a new trial had.

The court properly excluded the evidence offered by the plaintiff, that various persons had applied to the plaintiff for the purchase of these articles subsequently to the transactions and

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agreements with Sherman & Mayall, and that such persons had treated with the plaintiff as the owner of the same. This evidence was incompetent. *Exceptions sustained.*

JEFFERSON PRATT *vs.* WILLIAM H. HARLOW.

The mortgagee of personal property, although his mortgage is not recorded, may maintain an action of tort against one who, without any title, takes the property from the possession of the mortgagor.

ACTION OF TORT for the conversion of a horse. At the trial in the court of common pleas, at April term 1859, before *Aiken*, J., the plaintiff claimed title under a mortgage from William C. Mellus, who was allowed by the plaintiff to retain possession of the horse after the execution of the mortgage; and introduced evidence tending to show that Mellus owned the horse at the time of making the mortgage. The defendant denied the title of Mellus; introduced evidence that the horse was the property of a firm, consisting of Mellus and George W. Robinson; and claimed the horse under a conveyance from Robinson earlier than the plaintiff's mortgage. There was also evidence that the firm of Robinson & Mellus principally transacted their business in Roxbury; but the plaintiff's mortgage was recorded only in the office of the town clerk of Dorchester, where Mellus resided. The instructions requested, as well as those given, are stated in the opinion. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. W. May, for the defendant.

A. C. Clark, for the plaintiff.

DEWEY, J. The only question raised upon the bill of exceptions is upon the refusal of the presiding judge to rule, in accordance with the request of the counsel for the defendant, that if the jury were satisfied that, at the time when the mortgage was executed and delivered, Mellus, the mortgagor, principally transacted his business and followed his trade in the city

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of Roxbury, and the mortgage was not recorded in the city of Roxbury, the plaintiff could not recover against the defendant.

As to this point, the court ruled that, although the jury should be so satisfied, yet, if the jury found that the horse belonged to Mellus when he mortgaged it to the plaintiff, the plaintiff could recover under the mortgage as against one not claiming title under the mortgagor or under any one who could convey a title to him. The case upon this point is merely the question whether the plaintiff has a good legal title by virtue of this mortgage as against a mere intruder, denying the plaintiff's title, but establishing none in himself.

To maintain the action, it is true that the plaintiff must prove property in himself and the right of possession at the time of the alleged conversion. This he does by showing the execution of a mortgage of the property to himself, duly executed, to secure to him the payment of a sum of money named therein. This mortgage was recorded in the records of mortgages for the town of Dorchester. By force of the St. of 1843, *c.* 72, it was required to have been recorded "as well by the clerk of the town where the mortgagor resides, as by the clerk of the town in which he principally transacts his business or follows his trade or calling." Assuming, as the prayer for instructions does, that the principal place of business of the mortgagor was in Roxbury, then the statute required this mortgage to be recorded in the city clerk's office in Roxbury. As no such record was made, the mortgage would not avail, as against a subsequent purchase by or through the mortgagor, or against an attaching creditor of the mortgagor. But as between vendor and vendee it operated as a transfer of the property, and gave to the mortgagee the right to take possession under such mortgage; and upon a demand made upon one not deriving title through the mortgage and having no valid title through a third person, and a refusal to deliver the same and denial of the plaintiff's right to the property, such mortgage title may avail the mortgagee. He succeeds to the rights of the mortgagor so far that, if a stranger converts the property, he may as against him assert a title. That such a mortgage,

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independently of the statute requiring the same to be recorded, would vest the general property in the mortgagee, and, as there is no stipulation to the contrary, the right also to immediate possession, and the right to maintain an action of tort for a conversion of the property mortgaged, is well settled. *Brackett* v. *Bullard*, 12 Met. 308.

The object of the statute requiring the mortgage to be recorded was the protection of persons claiming under the mortgagor, and as respects such persons the title of the plaintiff would be invalid. By the Rev. Sts. *c.* 74, § 5, containing the provision that the mortgage should be recorded by the clerk of the town where the mortgagor resided, it was provided that unless so recorded it should not be valid "against any other person than the parties thereto," thus recognizing its validity to some extent, and leaving open only the question who are meant by "other persons." Looking at its object and the mischiefs apparently intended to be remedied by the law requiring mortgages of personal property to be recorded, the court are of opinion that the instructions given were correct, and that the omission to have the mortgage recorded in the city of Roxbury would not prevent the plaintiff from recovering against a mere stranger who should convert the property to his own use after demand made on him. *Exceptions overruled.*

SABRINA OLMSTEAD *vs.* JERUSHA B. PARTRIDGE.

In an action for a malicious prosecution, the best evidence of the institution of the prosecution is a certified copy of the record.

In an action for a malicious prosecution, evidence that the defendant, in commencing the prosecution complained of, acted upon the advice of a person not a counsellor or attorney at law, is incompetent to disprove malice.

The wilful overstatement of the amount of stolen property in a complaint for larceny is competent evidence of malice in a subsequent action by the defendant against the complainant for malicious prosecution.

ACTION OF TORT for a malicious prosecution by making a complaint to a justice of the peace, charging the plaintiff with

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larceny of one hundred sticks of oak wood, upon which the plaintiff was arrested and tried before a trial justice and discharged.

At the trial in the court of common pleas at April term, 1859, *Aiken*, J. admitted in evidence, against the defendant's objection, a certified copy of the record of the proceedings in that prosecution, without calling either the magistrate who received the complaint and issued the warrant, or the one who tried the case.

The defendant called the justice of the peace to whom the complaint was addressed, but who was not a counsellor or attorney at law, and offered to prove by him that the defendant, at the time of making the complaint, applied to him for advice and counsel, and stated that she had caught the plaintiff with two sticks of the defendant's wood in her arms. But the evidence was objected to and rejected.

Said justice then testified, without objection, that he advised a prosecution and put the complaint in such form as he chose, without consulting the defendant and without any directions from her, and in like manner issued a warrant, and that she had no control or direction of the matter, and merely testified at the trial, and that she then testified to the stealing by the plaintiff of two sticks only.

The plaintiff's counsel called the attention of the jury to the number alleged in the complaint, as evidence of malice. After the jury had been instructed "upon the essential ground of the action, the want of probable cause, and that it was competent to infer malice from this, in a manner satisfactory to the defendant, and to which no exception was taken," the defendant requested that the jury might be instructed as follows: "If the jury find that Mrs. Partridge only stated to the magistrate that she had missed wood and saw Mrs. Olmstead carrying away two sticks, and the magistrate thereupon drew the complaint in such form as he pleased, without any directions in that respect from Mrs. Partridge, then the words 'one hundred sticks,' being an immaterial allegation, would not be evidence of malice or want of probable cause on her part." The judge remarked to

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the counsel, in the presence and hearing of the jury, that it could not be evidence of the want of probable cause in any event, but that whether evidence of malice would depend upon whether the magistrate caused it to be inserted without suggestion on her part. No more particular instructions were afterwards requested.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Colburn, for the defendant.

W. Gaston, for the plaintiff.

Bigelow, C. J. 1. The copy of the record of proceedings before the magistrate was not only competent, but it was the only proper and legitimate method of proving the essential fact of the institution of the prosecution. *Stone* v. *Crocker*, 24 Pick. 87. *Sayles* v. *Briggs*, 4 Met. 421.

2. In actions for malicious prosecution, it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that in prosecuting the plaintiff on a criminal charge he acted in accordance with the advice of counsel on a full and correct statement of all the material facts bearing on the case. *Hewlett* v. *Cruchley*, 5 Taunt. 277. *Ravenga* v. *Mackintosh*, 2 B. & C. 693. *Stone* v. *Swift*, 4 Pick. 393. But such testimony has always been limited to communications with counsel or attorneys. Statements made to other persons and advice given by them have never been deemed admissible. The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience and as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process, if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself.

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3. The instructions given to the jury were entirely correct. The quantity of wood alleged in the complaint could have no bearing on the question whether the prosecution was instituted without probable cause; but it might show the *animus* of the defendant in making the complaint, if the quantity which she really supposed to have been actually stolen was grossly and wilfully overstated. *Exceptions overruled.*

JOSEPH M. HODGKINS & another *vs.* WILLIAM P. PEARSON & another & Trustee.

On the trial of an issue between the plaintiff and a claimant in a trustee process, it is within the discretion of the presiding judge, under *St.* 1839, *c.* 107, § 1, to admit the deposition previously taken of a witness present in court at the trial and willing to testify; and if a deposition is so used by the plaintiff in putting in his case, after the claimant has rested his, the refusal of the judge to allow the claimant afterwards to examine the witness, except to rebut the plaintiff's evidence, is no ground of exception.

TRUSTEE PROCESS. The principal defendants were defaulted, and Daniel M. Howard & Co. of Bangor, in the State of Maine, were admitted as claimants.

At the trial in the court of common pleas at April term 1859, before *Aiken*, J., the claimants put in, without objection, the deposition of one of the defendants; and after they had rested their case, the plaintiffs offered the deposition of Howard, one of the claimants, taken some time previously at Bangor, to the admission of which the claimants objected on the ground that Howard was present in court and willing to testify, and requested the judge to require the plaintiffs to use him as a witness. The judge overruled the objection, and allowed the plaintiffs to read the deposition. The court had not previously made any order, or been requested to make any, whether the evidence to be used on the trial should be taken by deposition or orally. After the plaintiffs had rested their case, the claimants called Howard, and proposed to examine him generally as a witness in the case; but the judge refused to admit his testi-

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mony, except to rebut the plaintiffs' case. The jury returned a verdict for the plaintiffs, and the claimants alleged exceptions.

A. Waterhouse, for the claimants.

T. K. Lothrop, for the plaintiffs.

CHAPMAN, J. The judge had discretionary power to direct that the deposition should be received instead of the oral testimony, under *St.* 1839, *c.* 107, § 1. And after the claimants had put in theirs in reply, it was proper and conformable to the usual practice to limit the testimony of Howard to such facts as would tend to rebut the plaintiff's evidence.

Exceptions overruled.

HENRY S. GLAZIER *vs.* SULLIVAN L. CARPENTER.

After an appeal has been taken from the judgment of the court of common pleas in a civil action, and entered in this court, and the appellant allowed to plead a certificate of discharge in insolvency, and the case remitted to the court of common pleas for trial of that issue, it is too late to object that the appeal was unauthorized by law.

ACTION OF CONTRACT. After trial and verdict for the plaintiff in the court of common pleas at December term 1857, the defendant suggested that a warrant in insolvency had issued against him, and moved for a continuance, which the court declined to grant; and the defendant then moved in arrest of judgment, for defects in the plaintiff's writ, and this motion being also overruled and judgment rendered for the plaintiff, the defendant appealed to this court, and entered his appeal at February term 1858, from which it was continued to October term 1858; and this court then gave the defendant leave to withdraw his motion in arrest of judgment, and to plead a certificate of discharge in insolvency, dated September 20th 1858, and without setting aside the verdict, remitted the case to the court of common pleas for trial.

At the trial in that court at April term 1859 the plaintiff objected that the former verdict and judgment in that court were conclusive and final; that the motion in arrest of judgment

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was frivolous and void, and against the provisions of the *St.* of 1852, *c.* 312, § 22; that the appeal taken from that judgment was unauthorized by law, and this court never had jurisdiction of the case; and that the defendant therefore could not rely upon his certificate of discharge in insolvency in defence of the action. But *Aiken*, J. overruled all the objections, and also a motion in arrest of judgment, filed upon like grounds after a verdict for the defendant. The plaintiff alleged exceptions.

W. L. Burt, for the plaintiff.

J. W. May, for the defendant.

Bigelow, C. J. The record in this case shows that the appeal was regularly taken and duly entered in this court, and that the case was remitted to the court of common pleas for the purpose of trying the question of the validity of the defendant's discharge. This was in accordance with our well settled practice in similar cases. *Morris* v. *Briggs*, 3 Cush. 342. *Lewis* v. *Shattuck*, 4 Gray, 572.

If the appeal was wrongly taken, the plaintiff should have either moved for judgment in the court of common pleas when the appeal was claimed, or applied to have it dismissed when it was entered in this court. But he did neither; on the contrary, the case was duly entered in this court, and remained here until it was sent back to the court of common pleas for the very purpose of enabling the defendant to plead his discharge in insolvency. After these proceedings, it was too late for the plaintiff to insist on the objection that the appeal was improvidently taken and allowed. *Exceptions overruled.*

Martin Higgins *vs.* Michael McDonnell.

Under the *St.* of 1852, *c.* 312, § 2, *cl.* 9, a declaration on a written contract, stating its legal effect, is sufficient, without alleging it to be in writing or setting forth a copy.

Action of contract, alleging that the defendant sold to the plaintiff a horse having a sore on one of his legs, and warranted

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that he would recover from the bruise and his sore leg would be as good as the other within a reasonable time, and that this warranty had been broken.

In the superior court, the plaintiff gave in evidence a written warranty of the horse, describing him as having a bruise on one leg, which the defendant warranted "to recover from the bruise to be as good as the other." The defendant contended that the action could not be maintained, because of a variance between the declaration and the proof, inasmuch as it appeared that the warranty was in writing, and yet the declaration did not set forth the written contract nor any part thereof, nor state any reason for not so doing, nor that the contract was in writing. But *Brigham*, J., at the trial, and THIS COURT on exceptions, held that there was no variance, and that as the declaration set forth the legal effect of the contract, it was sufficient under *St.* 1852, *c.* 312, § 2, *cl.* 9. *Exceptions overruled.*

S. L. Plummer, for the defendant.

T. L. Wakefield, for the plaintiff.

LUTHER BLAKE *vs.* ENOCH LORD & another.

Under a declaration for an assault and battery, containing no averment of special damage, the plaintiff may introduce evidence that his eyes were injured in consequence of a closing up of the tear passage caused by the blows inflicted by the defendant, and may also prove how long it was before he was able to use his eyes after the injury, and how long before his nose got well.

At the trial of an action against two defendants for a joint assault and battery, the defendants answered jointly, denying the assault, and averring that any acts committed by them were done in self-defence; and the evidence tended to show that one defendant assaulted and had an affray with the plaintiff, in which the other defendant took no part, that, at the close of this affray, and at a point more than forty feet from where it begun, the second defendant assaulted and had an affray with the plaintiff, in which the first defendant took no part, and that each defendant was present during the affray between the plaintiff and the other. *Held*, that the wife of one defendant was not a competent witness for the other.

ACTION OF TORT. "And the plaintiff says, the defendants made an assault upon him, and struck him and kicked him and threw a heavy stick of wood against his face, so that his face

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was greatly injured and disfigured for a long time, and he suffered great pain for a long time, and was for a long time unable to labor or follow his usual occupation." The defendants filed a joint answer, denying the assault, and averring that any acts committed by them were done in self-defence.

At the trial in the superior court, *Brigham*, J., against the defendants' objection, admitted evidence offered by the plaintiff tending to show that, owing to the assault upon him as alleged, the tear passage was closed up, and his eyes were in consequence greatly weakened and injured; and also permitted him to testify how long it was after the injury before he was able to use his eyes, and how long it was before his nose got well.

The testimony introduced by the plaintiff tended to prove that Robert Lord, one of the defendants, committed an assault and battery upon the plaintiff in which Enoch Lord did not participate, unless his presence under the circumstances offered in evidence was a participation in it; and also that at the close of the affray, and at a point more than forty feet from where the first blow was inflicted, Enoch Lord committed an assault and battery upon the plaintiff, in which Robert Lord did not participate, unless his presence under the evidence offered, might be considered a participation.

The wife of Robert Lord was offered as a witness in behalf of Enoch, but was excluded as not a competent witness.

The jury returned a verdict against both defendants, and they alleged exceptions.

A. L. Cushing, for the defendants.

W. Colburn, for the plaintiff.

Bigelow, C. J. The questions and answers to which objection was made at the trial were competent and relevant to the issue, and tended to show the nature and extent of the injury inflicted on the plaintiff, not by way of special damages, but as the necessary and natural consequence of the tortious act of the defendants. The assault having been joint and so found by the jury, the plaintiff was entitled to a verdict in damages against both the defendants for an amount such as the most culpable of them ought to pay.

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The assault and battery for which the plaintiff brought his action was alleged in the declaration to have been joint, and the defendants filed a joint answer, denying the assault, and averring that any acts committed by them were done in self-defence. The evidence at the trial tended to show that the transaction was a continuous one, in which the acts of both the defendants formed part of the *res gestæ*, and that they both participated in committing violence on the plaintiff. It was therefore impossible to separate the cases of the co-defendants. Evidence which tended to acquit the one would also tend to relieve the other. The wife of neither could testify without giving evidence in her husband's favor. She was therefore, by the well settled rule of the common law, an incompetent witness. *Rex* v. *Frederick*, 2 Stra. 1095. *Commonwealth* v. *Robinson*, 1 Gray, 555. 1 Greenl. Ev. § 335 This rule is not changed by St. 1857, *c.* 305, § 1, which only makes the wife competent to testify when she is a party or one of the parties to a suit. *Exceptions overruled.*

ENOCH PERKINS *vs.* MILTON YOUNG.

Evidence that a promissory note, which in terms is payable absolutely, was given for money paid under an agreement made between the maker and the payee, at the time of forming a copartnership together, by the terms of which the payee was to pay to the maker a certain sum of money, upon the receipt of the whole of which the maker was to convey to the payee an undivided half of the partnership property, and receive back the note; that the parties afterwards, as copartners, carried on business and used in it the money for which the note was given; and that the maker had always been ready to convey half of the partnership property to the payee, upon receipt of the balance of the sum agreed upon, but the latter had refused to pay the remainder of that sum; is not admissible in defence of an action on the note by the payee.

It is no defence to an action brought by the indorsee against the maker of a promissory note, payable on demand, that the maker and payee are or have been copartners in business, and that the accounts between them are unsettled.

ACTION OF CONTRACT by the indorsee upon a promissory note, dated November 20th 1858, for one hundred dollars, payable to James Perkins or order on demand.

Answer, "that at or before the date of said note the defendant and one James Perkins, the defendant being then the owner

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of certain express property, formed a copartnership, by the terms whereof, amongst others, said James Perkins was to pay the defendant the sum of nine hundred dollars or thereabout, and on the payment thereof to receive from the defendant a bill of sale of one undivided half of said express property: that in pursuance of said contract of copartnership said James Perkins paid to the defendant about two hundred and sixty five dollars and no more, for which he received two notes, one of which was the note declared on, as vouchers or receipts for the money so paid in pursuance of said partnership agreement, and it was so understood and agreed by the parties; and it was further understood and agreed that said notes were to be delivered up and cancelled on the delivery of said bill of sale to the said James Perkins by the defendant, on said James Perkins's compliance with his agreement to pay said nine hundred dollars or thereabout; that the money so paid by said Perkins was appropriated to the use of the partnership; that said Perkins, in pursuance of said agreement, became a member of said firm, and for several months took an active part in its business, and received and appropriated its funds to his own use as well as to the use of said firm, and became entitled to his share of the profits, and liable for its indebtedness, but neglected and refused to make further payments in execution of said partnership agreement, although the defendant is, was, and ever has been ready and willing to comply with the terms thereof, on his part to be performed; that said partnership accounts are still unsettled; and said Perkins has withdrawn from the firm, and refuses to perform his duties relative thereto."

At the trial in the superior court, the making and indorsement of the note were admitted; and the plaintiff objected that the facts alleged in the answer were inadmissible in evidence, and, if proved, would constitute no defence to the action. *Brigham*, J. sustained the objection, and directed a verdict for the plaintiff, and the defendant alleged exceptions.

J. W. May, for the defendant. The note being payable on demand, the maker may avail himself of all the equities between himself and the payee.

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The evidence was admissible. It did not go to show that the note was anything different from what it purports to be, or in any way to vary or contradict its terms; but only that there was a collateral agreement, for the most part verbal, but a part of which, namely, the note, was in writing. 1 Greenl. Ev. § 284 *a*. *Lewis* v. *Gray*, 1 Mass. 297. *Barker* v. *Prentiss*, 6 Mass. 430. It also showed that there was no consideration for the note; for the money paid to the defendant for which the note was given was due to him under the partnership agreement, and so his money as soon as paid to him. Even if there was a consideration for the note, it was paid by the execution on the part of the defendant of the copartnership agreement. *Crosman* v. *Fuller*, 17 Pick. 171. Perkins was admitted to the partnership, participated in its business, received and appropriated its funds. The defendant was always ready to perform his part of the agreement, and was prevented only by the refusal of Perkins to perform the condition precedent of paying the balance due. This readiness of the defendant, coupled with the refusal of Perkins, was tantamount to an execution by the defendant.

If the note was not paid, it is in the nature of an item in a partnership account upon which nothing would be found due on settlement; and the remedy of the plaintiff would be in equity.

W. Gaston, for the plaintiff.

Dewey, J. We consider the note as liable to the same defence as if in the hands of the original payee. It is however an absolute promise to pay James Perkins or order one hundred dollars on demand. No defence that would not be open to such an absolute promise in writing to pay money is open here. The defendant seeks to make this absolute note a conditional one, and to establish that condition by oral evidence. The alleged condition was, that it was understood and agreed that the note was to be delivered up and cancelled on the delivery of a certain bill of sale by the defendant to said James Perkins, on his compliance with his agreement to pay a certain sum of money. It is not contended that the same has been discharged

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by any actual delivery and acceptance of such bill of sale, but by his failure to pay a sufficient sum of money to entitle him to a bill of sale. The parties might have made a conditional agreement and so written this promise; or they might have made it, as it is now contended the original character of the transaction was, a payment of money for which a receipt was to be given as so much paid upon a contract for the sale of a certain interest in a certain express property. But as they did not adopt that mode, but resorted to the form of an absolute promissory negotiable note, we must suppose that the parties did not make that application of the money, and that was to be left for future action, and that in the mean time the relation of the parties as to the money received by the defendant was to be that of an absolute promise to pay to James Perkins or order that amount on demand. As the parties elected to treat this as money for which an absolute promise was given, this contract cannot now be varied or controlled by oral testimony. This subject has been often ruled upon by this court, and it is sufficient now to refer to the recent case of *Allen* v. *Furbish*, 4 Gray, 504, and cases there cited.

It was suggested at the argument, that this note being payable on demand, the defendant might avail himself of the equities between James Perkins and himself. The case seems to furnish no ground for setting up in defence to this action any equities between the original parties, arising from any other dealings or indebtedness of James Perkins to the plaintiff, except such as arose from the partnership relation under which they are alleged to have practically carried on business. These accounts have never been adjusted, and are now wholly unsettled, and cannot avail the defendant for the purpose for which they are offered.

The original consideration of the note was sufficient, being for so much money paid by the payee, for which the defendant gave him this note. *Exceptions overruled.*

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Obed Baker *vs.* Inhabitants of Dedham.

Upon the laying out of a turnpike by the county commissioners as a public highway, the town is not bound by law, or by any previous agreement of the turnpike corporation, and cannot be required by the commissioners, to keep in repair the private way of an individual passing under it.

Payment by a town for repairs made by order of one of the selectmen on a way, which the town is under no obligation to keep in repair, will not bind the town to keep it in repair thereafter.

Action of tort for injuries suffered by the plaintiff's cow, in passing through a dry bridge or cattle pass under a highway in Dedham. At the trial in the superior court, there was evidence of the following facts:

In 1806 and 1807, the Hartford and Dedham Turnpike Corporation built their turnpike through a pasture in Dedham, then owned by Timothy Baker, whose devisee the plaintiff was, and who, before the road was built, agreed to give them his land for the purpose, provided they should build him a dry bridge under the road, where it crossed the pasture, and pay him a certain sum per rod for fencing each side of the road through his land, in full of all damages. The turnpike was then built with a dry bridge or cattle pass, wide enough for cattle to pass through, from one part of the pasture to the other, under the travelled part of the turnpike, and the strip of land over which it was built was conveyed by Baker to the corporation in consideration of a gross sum "in full for all damages whatever, except the privilege of passing and repassing under the dry bridge now made across the said road."

The turnpike corporation kept this bridge in repair until the year 1828, when, upon their petition, the county commissioners laid out parts of the turnpike, including all of it in Dedham, as a common highway, and ordered the towns through which the highway passed to put the same in repair and order, "in a manner sufficient to insure the safety and ordinary accommodation of the travel having to pass thereon." In 1842 the defendants paid twenty seven dollars and fifty six cents for repairs made upon the bridge in 1839 and 1841 by order of one

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of the selectmen. The bridge afterwards settled and became narrower, and in consequence thereof in 1858 one of the plaintiff's cows attempting to pass under the bridge had the hair and skin torn from her sides.

Upon this evidence, *Brigham*, J. ruled that the defendants were under no obligation to keep the bridge in repair so that the plaintiff's cattle could pass through, and directed a verdict for the defendants, which was returned, and the plaintiff alleged exceptions.

E. C. Baker, for the plaintiff.

W. Colburn, for the defendants.

CHAPMAN, J.* It is well settled that the obligation of towns in respect to ways is wholly created by statute. When a highway is laid out and established by the county commissioners, all that towns have to do is, either to cause it to be made to the acceptance of the commissioners, or to pay the expense which the commissioners shall incur in causing it to be made. In this respect, they have their choice. After it is made, their remaining duty is to keep it in repair, so that it shall be safe and convenient for travellers. But there is no statute requiring them to keep in repair the private ways of individuals which may lead into it or pass under it.

The plaintiff has a private way passing under the highway in question, and this action is brought against the town for not keeping that way in repair. There being no statute requiring them to do this, the action cannot be maintained. The case is not strengthened by the contract made by the turnpike corporation with the plaintiff; for when the county commissioners laid out the turnpike as a highway, they had no authority to transfer the duty of performing this contract to the town, nor does it appear that they attempted to do so. And even if the town had authority to bind themselves to the plaintiff by agreement to keep his way in repair, there is no evidence tending to show that they have made such an agreement.

Exceptions overruled.

* METCALF, J. did not sit in this case.

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Inhabitants of Randolph *vs.* Inhabitants of Norton.

A citizen living three years successively, under an arrangement between all concerned, upon land of which he has paid the price, and which has been conveyed to a third person, who has given a bond to convey the same to him upon his paying a certain sum for the house thereon, and to permit him meanwhile to receive the rents and profits thereof to his own use, has an estate of inheritance therein in trust, and gains a settlement under the Rev. Sts. c. 45, § 1, cl. 4.

Action of contract for the support as paupers of Oliver W. Vinton and his wife and children in 1858 and 1859. The defendants admitted that Vinton's lawful settlement was in Norton before March 1856, but contended that he then acquired one in Randolph. The case was submitted to the judgment of the court upon facts agreed, which are stated in the opinion.

E. Ames, for the plaintiffs.

C. I. Reed, for the defendants.

Metcalf, J. It has been decided that under the Rev. Sts. c. 45, § 1, cl. 4, a citizen gains a settlement in a town by having therein an estate of inheritance or freehold in trust, and living thereon three years successively. *Scituate* v. *Hanover*, 16 Pick. 222. So it was decided, under *St.* 1793, *c.* 34, § 2, *cl.* 4, (which was repealed in 1822,) that a citizen gained a settlement in a town by having therein an estate of inheritance or freehold in trust, of a certain clear yearly income, and taking the rents and profits thereof three years successively, whether he lived thereupon or not. *Orleans* v. *Chatham*, 2 Pick. 29. And the main question in the present case is, whether the pauper Vinton had such an estate in Randolph, and lived thereon three successive years.

The facts are these: In February 1853, Vinton took possession of a house which he had purchased of Salmon Buck, but had not paid for, and which he had removed and placed on a lot of land, for the purchase of which he had made an oral agreement with Joseph Linfield, but of which he received no deed; and he has ever since lived in that house on that land. In March 1853, Vinton paid Linfield for the land, and in pursuance of an arrangement made by all concerned, Linfield

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gave a deed of the land, in fee, to Buck, and Buck thereupon gave a bond to Vinton, the condition of which was, that he would give a deed of the land to Vinton on his paying Buck a note that he had made to him for the estimated price of the house ($25) and which was payable on the 1st of April 1856. It was also provided in the condition of the bond, that Buck should permit Vinton, until such deed should be given to him, to receive to his own use the rents and profits of the premises. In March 1856, Buck conveyed the land, with the house thereon, to Vinton, by a warranty deed, to hold to him, his heirs and assigns forever.

What estate in the premises had Vinton during the three years from March 1853 to March 1856? According to the decision in *Scituate* v. *Hanover*, above cited, from which this case seems to us not to be distinguishable, he had an estate of inheritance in trust, that is, he was *cestui que trust* of such an estate. The bond for a deed of the premises, which was given to him by Buck, with permission to him to take the rents and profits to his own use until the deed should be given, is to be regarded as a written declaration of trust.

Plaintiff's nonsuit.

DAVID S. FOGG *vs.* EPHRAIM W. FARR & another.

A party who introduces an auditor's report at the trial, and relies upon any part of it as evidence, may be properly required to read the whole report; but is not thereby concluded from controlling by other evidence the *prima facie* case made by the auditor's report in other respects.

ACTION OF TORT for the conversion of various tools. The case was referred to an auditor to find and report which of the articles named in the declaration had been taken by the defendants and afterwards demanded of them by the plaintiff, and the value of such articles.

At the trial in the superior court, the plaintiff, after offering other evidence of the value of the various articles, "introduced the auditor's report, but offered it only as evidence of the

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demand upon the defendants, and of the articles converted by them, and did not put in the finding of the auditor as to the value of any of the articles." *Brigham*, J. thereupon ruled that the auditor's report, being so put in, was put in for all its findings; and instructed the jury that the plaintiff, having offered in evidence the auditor's report, and the finding of the auditor upon the value of the articles, could recover no more than their value as indicated by the auditor's report; that the auditor's report was *prima facie*, and as to the plaintiff conclusive, evidence of the value of these articles; but the jury might consider any other evidence of their value, offered by the plaintiff, or in the case, as tending to show that their value was not less than the value found by the auditor.

The jury returned a verdict for the plaintiff, assessing damages upon the basis of the value found by the auditor, and the plaintiff alleged exceptions.

W. L. Burt, for the plaintiff.

W. Gaston & O. G. Peabody, for the defendants.

Bigelow, C. J. The plaintiff, if he relied on the report of the auditor as evidence at all, was properly required to read the whole of it. But by so doing he was not precluded from showing that in certain particulars in regard to which the finding was adverse to him the report was erroneous. As to those particulars, it was only *prima facie* evidence against him, and not conclusive. Such is the rule as established by St. 1856, c. 202, and re-enacted in the Gen. Sts. c. 121, § 46. So far therefore as the report was in favor of the plaintiff, it made out a *prima facie* case in his behalf; and so far as it was adverse, it established a *prima facie* case for the defendant, and made it incumbent on the plaintiff to overcome it by other proof. This is a convenient and reasonable rule, and one of which the defendant in the present case had no reason to complain. The effect of the ruling at the trial was to deprive the plaintiff of his right to go to the jury on that part of his case as to which the auditor had found against him. *Exceptions sustained.*

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William Rupp *vs.* George R. Sampson & another.

If a middleman brings together a buyer and a seller, each of whom has agreed, without the knowledge of the other, to pay the middleman a commission on any contract which may be made between them, and a contract is made between them, in the making of which the middleman takes no part as agent for either, the conduct of the middleman in concealing from each his agreement with the other is not fraudulent, and is no defence to an action brought by him against either to recover the commission agreed upon.

In an action on an agreement made by the seller to pay a commission on the contract made by him with a buyer to a person who brought them together, but took no part as agent for either in the making of the contract, evidence to prove a usage among brokers, as to the time when a commission is to be considered as earned, is inadmissible.

Action of contract for services rendered by the plaintiff to the defendants, according to an account annexed, namely for "brokerage" at the rate of one per cent. "as per agreement" on rattans imported in ships Brothers and Merrimack Trial in the superior court before *Brigham*, J., who signed the following bill of exeptions:

"There was evidence tending to prove that the plaintiff in 1858, in consequence of communications had by him with one Clew of New York, had interviews and conversations with the defendants, who were partners under the style of Sampson & Tappan and owners of ships employed in the East India trade, in relation to the terms upon which they had imported and would import rattans into New York; that the plaintiff communicated the result of these interviews and conversations to Clew, and told him, amongst other things, that the defendants desired a personal interview, and thereupon Clew came to Boston, and was introduced by the plaintiff to the defendants; that thereupon Clew and the defendants made a contract for an importation of rattans by the defendants' ship Huzzar into New York; that when this contract was concluded, and after Clew had left their presence, the plaintiff said to the defendants that he expected to be paid commissions, having had a good deal of trouble in bringing the parties together; that after some discussion between them as to this claim, the defendant Tap-

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pan, desiring to consult his partner, requested the plaintiff to call next day, which he did, when the plaintiff and defendants agreed that the plaintiff should receive one per cent. commissions on the bargain made in reference to the importation by the Huzzar, and on all subsequent bargains between the parties; and that the plaintiff requested the defendants not to disclose to Clew their agreement about commissions. There was also evidence tending to prove that, before Clew made any contract with the defendants or made their personal acquaintance, he had agreed to pay the plaintiff one per cent. commission for bringing him in contact with parties who would do the business of importing rattans for him, and that this agreement was never disclosed to the defendants.

"After the contract for the importation of rattans by the Huzzar, Clew and the defendants made like contracts for the importations of rattans by ships Nightingale, Brothers, and Merrimack. The contracts for importations by the Huzzar and the Nightingale were fulfilled by Clew and the defendants, and the plaintiff received his one per cent. commissions on these contracts from Clew as well as from the defendants. The rattans imported by the Merrimack and the Brothers were refused and not received by Clew, and neither the defendants nor Clew paid the plaintiff commissions upon the contracts made in reference to these ships.

"There was evidence tending to prove that the several contracts referred to were made by Clew and the defendants, without the aid, assistance or intervention of the plaintiff, except as before stated. There was also evidence tending to prove that the plaintiff had acted as a real estate agent for his mother, bought and sold stocks sometimes, but was not a merchandise broker, and had never acted in that character before the transactions herein referred to.

"The defendants offered evidence as to the time when, by the usages of trade, commissions are considered to be earned by persons acting as brokers between parties buying and selling. This evidence, upon objection on the part of the plaintiff, was excluded.

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"The jury were instructed, among other things, that if the plaintiff was employed by Clew to make contracts for the importation of rattans by the defendants, for commissions to be paid by Clew, he was the agent of Clew to act for his benefit, and his relation to Clew was adverse to the interests of the defendants; and if afterwards employed by the defendants to contract for such importations, for commissions, in the belief that he was acting as their agent to make sales for their benefit, the plaintiff's failure to disclose his relation to Clew would operate as a fraud upon the defendants, and would prevent him from recovering commissions of them; but if it was understood and agreed between the plaintiff and defendants, that the plaintiff was to receive commissions for introducing Clew to them, so that by means of the acquaintance thus procured they could personally make contracts for importations of rattans with Clew, and they, by means of such acquaintance, personally undertook to make and made such contracts with Clew, the plaintiff taking no part as the agent, or for the interest of either party, to buy or to sell, his relation to Clew was not adverse to the interests of the defendants, and his failure to disclose his relation to Clew in the transactions was not so far fraudulent as to prevent his recovering such commissions, if the jury, under the other instructions of the court, found that the same had been earned and were due when the plaintiff brought his action."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

C. A. Welch, for the defendants.

J. W. May, for the plaintiff.

Bigelow, C. J. We can see nothing in the conduct of the plaintiff which was fraudulent, or which operated to deceive the defendants in making the agreement to pay him for his services. He made no false representations to them. They knew the nature and value of his services, and the extent to which they were beneficial to them. It was wholly immaterial that he was also to receive compensation from the other party. It might well be that the services of the plaintiff were of value to both parties, and that each might be willing to pay accord-

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ing to the benefit received by each. We know of no principle of law, on which an agreement to pay for services rendered, honestly entered into, can be avoided on the ground that another person, having interests wholly distinct and independent, has stipulated by a separate contract to pay for the same services. Both contracts are valid; they are made upon good consideration; and each agrees to make compensation for a benefit which he expects to receive from the bargain. In the present case, there is nothing to show that the commissions which the plaintiff was to receive from both parties were excessive or unreasonable, or that they would together constitute an unusual or extraordinary compensation for the services rendered by him. On the contrary, the jury have found, under the instructions given by the court, that the sum claimed of the defendants had been earned and was due when this action was brought, notwithstanding the contract with the other party for the payment of a like sum. The claim of the plaintiff would have stood on a very different ground if he had been employed as a broker to buy or sell goods. It would in such case have been a fraud for him to conceal his agency for one from the other. The interests of buyer and seller are necessarily adverse, and it would operate as a surprise on the confidence of both parties, and essentially affect their respective interests, if one person should without their knowledge act as the agent of both. *Farebrother* v. *Simmons*, 5 B. & Ald. 333. Story on Agency, § 31. But the plaintiff did not act in any such capacity. He was not an agent to buy or sell, but only acted as a middleman to bring the parties together, in order to enable them to make their own contracts. He stood entirely indifferent between them, and held no such relation in consequence of his agency as to render his action adverse to the interests of either party. This distinction was taken at the trial, and carefully and accurately stated in the instructions given to the jury.

The evidence offered by the defendants as to the usages of trade was rightly rejected, because it related to a class of contracts unlike that which was in issue in the present case. It was therefore irrelevant. *Exceptions overruled.*

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Sumner Rockwood, Administrator, *vs.* George K. Wiggin & others.

The delivery of the property, necessary to the validity of a gift *causa mortis*, cannot be proved by subsequent declarations of the deceased, shortly before death, to a person not connected with the gift.

Bill in equity by the plaintiff as administrator of the estate of his deceased wife, Betsey T. Rockwood, against George K. Wiggin, Allen Wiggin, Ellen Kelleher, and the executor of the will of Pierce Edgerly, to obtain possession of a trunk containing several promissory notes payable to her, and two books containing the evidence of deposits made by her in a savings bank. The defendants claimed the property under a gift *causa mortis* from the deceased; and an issue to determine whether she had made such a gift was framed and tried before *Hoar*, J., and found for the defendants.

At the trial, the defendants proved a letter signed by the deceased, and not witnessed, containing directions for the distribution of this property among the defendants; and the following questions of law arose, and were ruled, for the purposes of the trial, in favor of the defendants, and reported for the consideration of the full court:

1st. Whether a married woman can make a valid gift *causa mortis* of the whole or any part of her separate property, without the assent of her husband.

2d. Whether a gift *causa mortis* of deposits in a savings bank can be made by a delivery of the bank book.

3d. Whether the following testimony of Thais Stoddard was competent evidence to prove such a gift: "I visited Mrs. Rockwood on the day of her death; Mrs. Rockwood said she had made a will, and asked me whether I thought the will would stand the law; said that she had written it and given it to Ellen; that she wished Ellen to keep it and her trunk and papers in the trunk to give to Pierce to carry to Lawrence in case she died. She mentioned notes and bank books in the trunk, and

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said she had sold a farm in Worcester County, and the notes for it were in the trunk; that she wished her property disposed of according to the paper, as she had written, and that Ellen was to have some of it; that the paper was written three days before, and that Ellen had the trunk and was to give it to Pierce to carry to Lawrence. Pierce was Mrs. Rockwood's brother, and was in the house at the time. Ellen was a domestic in the family."

O. Stevens, for the defendants.

W. S. Leland, for the plaintiff.

DEWEY, J. To constitute a valid gift *causa mortis*, there must be a delivery of the property to the donee, or to some third person for the donee.

The declarations of the deceased to Thais Stoddard, as shown by the defendants in her testimony, are not competent evidence to establish the alleged *donatio causa mortis*. The fact of delivery must be proved by other evidence than by mere declarations of the deceased to a person disconnected with the transaction, of the character stated in the report of the evidence in the present case. The language used by the deceased to this witness would seem rather to indicate that she had the purpose to dispose of her property by a will. Such gifts being really of a testamentary character, and operating in favor of the donee much as a legacy, and yet without the safeguards that the statute has thrown around wills, are not to be sustained, unless clearly established by the proof of all the facts essential to their validity.

Whether a married woman can make a valid gift *causa mortis* of her whole property without the assent of her husband, under the provisions of our statute restricting a testamentary disposition of her sole property to one half the amount thereof, we have not thought necessary in the present state of this case to decide; or to consider the question whether deposits in savings banks can be subjects of such donation by a mere delivery of the bank books. *Verdict set aside, and new trial ordered.*

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JOHN MULHERN *vs.* PATRICK MCDAVITT.

A husband who receives into his family the children of his wife by a former marriage stands to them *in loco parentis*, and, in the absence of express contract or of circumstances showing a different arrangement, has a right to their services and is liable for their support and education.

A husband, who for seven years has lived in a house belonging to his wife and her three children by a former marriage, has been appointed guardian of the children and kept them in the house with himself and their mother, has no property of his own, has only earned enough during the time to support the united family, and has sold the real estate of his wards by leave of court, is not to be charged in his guardian's account with any previous rent thereof, or credited with taxes paid thereon, or with the board and clothing of his wards, but may be allowed a reasonable amount paid for the expenses of one of the wards at a boarding school.

APPEAL from a decree of the probate court, allowing an account of a guardian, crediting his ward with $276.92, proceeds of sale of his undivided fourth of certain real estate, with $186.66 for nearly seven years' rent thereof, and $49.50 for the ward's services, and charging him with $14.84 for taxes on his said share of the real estate, $237.50 for board and clothing for three years and eight months, and $104 for his expenses at a boarding school.

Hearing before *Hoar*, J., who reported the case for the opinion of the full court upon the following facts agreed:

The appellant was a son of John Mulhern, who died in 1851, leaving a widow and three minor children, a small amount of personal property, consisting chiefly of household furniture, and a bond for a deed of the house occupied by him, which was worth about eleven hundred dollars, and was afterwards conveyed to his wife and children, to hold in equal proportions. No letters of administration on his estate were ever taken out. In August 1852 the appellee married the widow and went to live with her and her children, occupying their house, having no children of his own, and assuming by common consent the direction of affairs as head of the family. He had little or no property of his own, and has been engaged in keeping a small shop on the premises, earning little or nothing more than enough to support the family, and employing the appellant, from time

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to time, in his shop. In January 1857 the appellee was appointed guardian of his wife's children, and in April 1859 sold the real estate of his wards by license of the probate court. The board and lodging charged to the ward in the guardian's account covered time both before and after his appointment, and the last charge in the account was for money paid before such appointment for the ward's board and tuition at the House of the Angel Guardian, a private boarding school in Boston.

J. W. May, for the appellant, cited 2 Kent Com. (6th ed.) 192; 1 Parsons on Con. 257; *Stone* v. *Carr*, 3 Esp. R. 1; *Williams* v. *Hutchinson*, 3 Comst. 312; *Sharp* v. *Cropsey*, 11 Barb. 224; *Lantz* v. *Frey*, 19 Penn. State R. 366; *Brush* v. *Blanchard*, 18 Ill. 46; *Hussey* v. *Roundtree*, Busbee, 110; *Guenther* v. *Birkicht*, 22 Missouri, 439.

G. Morrill, for the appellee, cited *Tubb* v. *Harrison*, 4 T. R. 118; *Cooper* v. *Martin*, 4 East, 76; *Freto* v. *Brown*, 4 Mass. 675; *Worcester* v. *Marchant*, 14 Pick. 510; *Cole* v. *Eaton*, 8 Cush. 587; Reeve Dom. Rel. 324; *Dawes* v. *Howard*, 4 Mass. 97; *In re Kane*, 2 Barb. Ch. 375; *Harring* v. *Coles*, 2 Bradf. 349; *Gillett* v. *Camp*, 27 Missouri, 541.

Chapman, J. A husband was not by the common law obliged to support the children of his wife by a former marriage. This doctrine has been recognized in this Commonwealth. *Freto* v. *Brown*, 4 Mass. 675. *Commonwealth* v. *Hamilton*, 6 Mass. 273. *Worcester* v. *Marchant*, 14 Pick. 510. The law has been changed in this respect in England, by *St.* 4 & 5 W. 4, *c.* 76, § 57, which requires the husband to support the children of his wife, legitimate or illegitimate, as a part of his family, till they arrive at the age of sixteen years or till the death of their mother. We have no statute on the subject, and the common law is still in force here.

But though the husband is not obliged to take the children into his family, yet if he does so he stands *in loco parentis* in respect to them, and in the absence of an express contract, or of circumstances showing a different arrangement, he has a right to their services, and is liable for their support and education. 2 Kent Com. (6th ed.) 192.

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In *Stone* v. *Carr*, 3 Esp. R. 1, the second husband had taken possession of the house and business of the deceased husband, and had gone abroad, leaving the children in the care of his wife. He was held liable on her contract for their maintenance and education. Lord Kenyon said, if the wife had property by her first husband, the case was stronger; for then part of the property of which he possessed himself belonged to the children; but even if the father had died insolvent, it would not have altered his opinion. In *Cooper* v. *Martin*, 4 East, 76, the stepfather recovered of the wife's son compensation for his support, but it was placed on the ground of a promise to pay by the son after he came of age, he having a considerable estate and the stepfather being poor.

The case of *Williams* v. *Hutchinson*, 3 Comst. 312, was an action by the wife's son to recover of the stepfather for the value of his services over and above his support. The balance was found to be considerable; but it was held that he could not recover. The subject is there discussed fully, and the authorities are cited. The court held that by receiving the wife's child into the family, the husband stands *in loco parentis*, with the rights and obligations of a parent; and that the policy of the law is to encourage an extension of the circle and influence of the domestic fireside, and its presumptions are in favor of the existence of this relation, unless a different arrangement is proved to have been made.

In this commonwealth it is quite common, upon second marriages, that the wife's children are received into the family as members; and such an arrangement must tend to promote the happiness of the mother and the welfare of the children. It is therefore a wise policy which encourages the extension of the family relation to cases of this kind, and presumes its existence in the absence of a different arrangement.

If then the appellee stood *in loco parentis* towards the appellant, no charge should be made for services on the one hand, nor for board or education on the other. There is no evidence tending to show any agreement during the mother's life. The appellee married her, moved into the house which belonged to

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her and the children, and made it his home. The whole family remained there, the appellee laboring for him except when at school, and the appellee providing for their support. The children had the best possible use of their property, and no rent ought to be allowed for it. But under all the circumstances of this case the court are of opinion that the sum of $104, which was paid for the board and tuition of the appellant at the Angel Guardian, should be charged upon his property. The account should be reformed by striking out the credit for rent and the charges for board, clothing and taxes. *Decree accordingly.*

Robert G. Shaw & others *vs.* Norfolk County Railroad Company & others.

After a suit in equity has been referred to a master, and heard and reserved on his report, presenting questions of law only, for the consideration of the full court, it is too late to apply to have issues of fact framed for trial by jury.

After a railroad corporation had executed a mortgage of its road, it united with two other railroad corporations in organizing a new corporation under the authority of an act of the legislature, which vested the property of the three former corporations, subject to all liens and incumbrances then existing upon it, in the new corporation, and provided that the first corporation should not by such union be relieved from any liability or obligation under which it then was, and that "when the several corporations shall in conformity to the requirement of the statutes have become one, all the franchises, property, powers and privileges now enjoyed by, and all the restrictions, liabilities and obligations conferred upon, said two corporations by virtue of their respective charters shall appertain to said united corporation, in the same manner as if contained or acquired under an original charter." *Held*, that this statute did not require the new corporation to assume the liabilities of the former corporations; and that the new corporation, having become the owner of the franchise and property of the first corporation, might become purchasers of its outstanding bonds, and hold them like any other creditor, or pay and extinguish them for the relief of the mortgaged property.

Held, further, that the directors of the new corporation had authority, without a vote of the stockholders, to pay and cancel so many as they thought fit of the outstanding obligations of the first corporation.

Held, also, that the new corporation could not prove the amount of the interest coupons attached to the bonds in their hands against the mortgaged property, so as to relieve it to that extent from liability under the mortgage.

Held, also, that bonds of the first corporation, bought by the new corporation, and afterwards reissued for the benefit of this corporation to holders for a valuable consideration, had not been extinguished, but should be allowed as a claim against the property covered by the mortgage.

Held, also, that the bondholders were not entitled to interest upon the interest coupons attached to the bonds.

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Shaw & others v. Norfolk County Railroad Company & others.

BILL IN EQUITY to foreclose a mortgage executed by the Norfolk County Railroad Company to the plaintiffs as trustees, to secure the payment of certain bonds of that corporation, upon which the court at a former term entered a decree for possession. See 5 Gray, 162 *& seq.* The successors of the plaintiffs as trustees afterwards filed a petition for an account of the bonds now outstanding and for the instructions of the court in regard to the distribution of net proceeds of the working of the railroad in their hands. Upon this petition the case was referred to a special master in chancery, and on the coming in of his report was heard by *Bigelow*, J., who reserved the questions of law arising thereon for the consideration of the full court. At the argument, the Boston and New York Central Railroad Company claimed a trial by jury. The facts necessary for understanding the points of law decided appear in the opinion.

B. R. Curtis & C. T. Russell, for the plaintiffs.

S. Bartlett & T. H. Russell, for the Granite Bank and others.

J. A. Andrew, for Chaddock, Urann and others.

E. H. Derby, for the Long Island Railroad Company.

C. Smith & S. W. Bates, for the Boston and New York Central Railroad Company.

MERRICK, J.* The several questions of law arising upon the report of the master, to whom the petition and return of the plaintiffs had been specially referred, "to inquire, ascertain and report how many of the bonds originally issued by the Norfolk County Railroad Company are now outstanding, and entitled to the benefit and security of the mortgage made by that corporation, and to share in any dividend of the proceeds of the working of said Norfolk County Railroad, now in the hands of said trustees, and the amount that is due upon said bonds," were reserved for the consideration of the full court by the presiding judge before whom the cause came on to be heard.

These questions relate to the allowance or disallowance of the various claims which were presented to the master, in the course of his inquiry and investigation, by persons assuming to

* DEWEY, J. did not sit in this case.

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be creditors of the Norfolk County Railroad Company, and entitled to the benefit of the mortgage made by that corporation. The results at which he arrived depended upon the state of facts applicable to each class of the claims presented, and they are accordingly open to separate and distinct consideration.

1. The Boston and New York Central Railroad Company object to the report finding that the bonds and interest coupons mentioned in the schedule numbered 3, and also those mentioned in the schedules numbered 4 and 5, are not outstanding, and are not entitled to the benefit and security of said mortgage, nor to share in any dividend of the proceeds of the working of the Norfolk County Railroad, now in the hands of the trustees. And it is contended in their behalf, that they are not to be concluded by the finding, or upon the facts stated in the report of the master, but have a right now to have their demands submitted and determined upon a trial by jury.

There is no doubt that, under the provisions of the Constitution, parties in cases in equity, as well as at law, are entitled to a trial by jury for the determination of all controverted questions of fact. This right is now regulated by the statute which expressly authorizes the court to frame issues of fact for that purpose, and to order the trial to be had upon them either at its own bar or at the bar of the superior court. Declaration of Rights, art. 15. *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 376. *St.* 1859, *c.* 237, § 13. Gen. Sts. *c.* 113, § 22. But to be availed of, it must be asked for seasonably and at the appropriate time. If the court be not at least apprised by a party that he desires to have the cause take that direction, or be disposed of in that manner, he will be considered as having waived his right in that respect, and cannot afterwards be allowed to insist upon it.

In the present case, at an early stage in the proceedings, the petition and return of the plaintiffs were referred to a master with special and definite instructions. After his report was made, the cause came on for hearing before a single judge. If it was intended by any of the defendants to seek for or insist

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upon a trial by jury, that was the proper time for making a motion to that effect. But no such motion was then made, and the various questions of law arising upon the report were accordingly reserved for the consideration of the whole court. It is quite too late, when those questions come on to be argued, to move for the framing of issues of fact.

But besides this, there is another decisive, and perhaps more satisfactory, objection to the allowance of the motion for a jury trial. Such a trial can be had only when controverted questions of fact are shown to be depending in the case, or when the final decision of it is to be made upon facts respecting which the parties are at variance. No difficulty of that kind exists in the present case. Everything stated by the master to have been proved, and everything which was offered on the part of the defendants to be proved, is acquiesced in and conceded. The rights of the parties are accordingly to be determined upon these facts, making the questions in controversy between the parties mere questions of law.

This brings us then to the consideration of the question, whether, upon the admitted facts and upon their own showing, the Boston and New York Central Railroad Company are entitled to have the finding of the master, disallowing their several claims, reversed.

After the Norfolk County Railroad Company had issued their bonds, in different sums of money, to the amount of seven hundred thousand dollars, and had made and executed a mortgage of their franchise, road and other property, as security for the payment of them, that company and the Woonsocket Railroad Company and certain other designated companies were authorized by an act of the legislature to unite themselves, upon certain prescribed terms, as one corporation. Under the authority of that act, and having complied with the prescribed terms and conditions, these several corporations did unite and form one corporation, taking the name of the Boston and New York Central Railroad Company. This union, and the formation of the new corporation, were afterwards duly confirmed and established by a subsequent statute. *Sts.* 1852, *c.* 158; 1854, *c.* 447.

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It is a necessary consequence of this consolidation, that all the property belonging to each of the companies thus united became vested in the new corporation as its own, subject however to all the liens and encumbrances then existing upon it, and to the rights of their respective creditors to resort to it as a fund from which they might derive payment of their claims. This, in reference to the Norfolk County Railroad Company, is specially guarded by the provision that they "shall not, by any such union with any other company, be thereby released from any liability or obligation under which they now are, whether [to] bondholders or any other person or persons." *St.* 1852, *c.* 158, § 1. On the other hand, this transfer of property by operation of law did not impose upon the new corporation the obligation to pay the debts of the former corporations, nor subject it to any liability to their creditors. The particular provision that, when the several companies shall, in conformity to the requirements of the statutes, have become one, "all the franchises, property, powers and privileges now enjoyed by, and all the restrictions, liabilities and obligations imposed upon, said two corporations by virtue of their respective charters, shall appertain to said united corporation, in the same manner as if the same had been contained in or acquired under an original charter," does not require the assumption of liabilities incurred by the former companies by the contracting of debts, or arising out of acts done in the construction of their road, or in the prosecution of their business; but confers the privileges and imposes the obligations which are given to or required of all railroad companies by the general law by which the powers and duties of such corporations are defined and regulated. Then the Boston and New York Railroad Company, having become the owners of the franchise and property of the Norfolk County Railroad Company, subject to the rights of their creditors, could either become purchasers of the outstanding bonds, and hold them like other creditors, or could pay and extinguish them for the relief and discharge of their own property, as they should deem it most for their interest and advantage to do.

The real question therefore, in reference to the bonds and

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interest coupons specified in the schedule numbered 3, is whether the defendants intended to extinguish and discharge, and have in fact extinguished and discharged, those bonds and coupons, and thus to that extent have relieved their property from the mortgage made by their predecessor. And of this, upon the facts alleged and offered to be proved by the defendants and conceded by all other parties in interest, we think there can be no doubt.

On the 7th of March 1854 the Boston and New York Central Railroad Company, at a legal meeting of the stockholders, adopted and ratified a mortgage on the franchise and property of the company, which had been prepared and executed under a vote of the directors, to secure the payment of bonds to the amount of twelve hundred thousand dollars; and voted that this mortgage should, from and after that day, be binding on the company. In this mortgage, a vote of the directors was inserted, providing "that in the issue of the said twelve hundred thousand dollars of bonds there shall be retained unissued by the corporation such amount of said bonds as at any given time shall be equal to the amount of said Norfolk County Railroad bonds then remaining uncancelled." From this it is evident, that the company intended to make provision for the payment and extinguishment of the debt secured by the previous mortgage, leaving the management of all matters of detail in relation to it to the officers of the company upon whom such duty should properly devolve.

Subsequently to this, the bonds of the Norfolk County Railroad Company, to a large amount, were by the holders thereof surrendered to and obtained by the directors of the new corporation; and on the 20th of the same month of March, the directors voted that these bonds, and also those that should thereafterwards be received, should be placed in the hands of the president, "to be by him used temporarily as collateral security, or be cancelled and defaced, whenever he shall think proper or expedient to do so." In execution of the authority conferred by this vote, the said bonds mentioned in schedule numbered 3, amounting to $285,650, were, by the order and direc-

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tion of the president, and in his presence, "punched full of holes," "to prevent them from ever again being issued." After this they were passed over to the trustees under the twelve hundred thousand dollar mortgage, from whom the directors thereupon received an equal amount of the Boston and New York Central Railroad bonds. And these were subsequently issued to the public, and are still outstanding. At a later period, namely, on the 10th of May 1856, the directors voted that "all of said bonds," namely, those of the Norfolk County Railroad Company, amounting to $285,650, "have been paid, cancelled and punched, and this corporation will make no further claim for payment of said bonds." And finally, at a meeting of the directors on the 22d of August 1856, after reciting that whereas the said bonds "have been heretofore paid, discharged and cancelled by this company, and holes punched through the same indicate that fact, and whereas it is desirable that such bonds should be preserved as vouchers merely of such payment and cancellation, and yet that there should be no possibility of question as to their said cancellation," they voted "that the treasurer be and he hereby is directed to write upon the face of each of these bonds, 'Paid, discharged and cancelled.'" This direction was afterwards complied with.

Nothing can be more decisive than this, in relation to the election and determination of the company to extinguish and discharge their bonds, if the directors, in the exercise of their office and in the discharge of their duties, had authority to pass these votes and cancel the bonds. Nor is this disputed. But it is contended that the directors were not invested with any such authority, and possessed no right to do any such acts. And accordingly the company, at a legal meeting of the stockholders on the 24th of October 1859, disavowed all these proceedings, and voted, in reference to all the votes and acts of their directors relative to the payment, discharge and cancellation of said bonds, that they "were not authorized by this company, and that the directors had no power to make such surrender of said bonds; and that this company refuses to sanction such votes, and the proceedings thereunder, by which the words 'paid, cancelled and discharged' were written on said bonds."

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But the denial of the power and authority of the directors of the company, upon which the claim to be entitled to prove these bonds, and to share in the earnings of the Norfolk County Railroad, in the hands of the trustees, wholly depends, cannot be sustained. The by-laws of the company in no way define or prescribe the duty of its officers, or limit their authority. The immediate government and direction of its affairs is therefore vested, by the general provisions of the statute, in the board of directors. Rev. Sts. *c.* 39, § 49. And they have consequently the power, in relation to all matters concerning the control and disposition of the property of the corporation, and in the conduct of its business, to do whatever it would be competent for the company itself to do or direct or order to be done. It is argued that the directors are the agents of the company, to manage and protect the property of the company, and not to destroy or give it away; and that therefore they could not cancel or discharge the bonds of the Norfolk County Railroad Company, of which they had become the owners. Certainly it is the duty of the directors to take care of and preserve the property and effects of the corporation; but this leaves them entirely at liberty to judge in what manner this can best be effected. If the directors thought that the interest of the company would be more promoted by cancelling and extinguishing the claims which were secured by the outstanding mortgage made by the Norfolk County Railroad Company, and thus enhancing the value of the security under the mortgage made by the new corporation, than by retaining the bonds of which they had become possessed, and holding them with the purpose of sharing in the proceeds and earnings which might be realized by the trustees from the working of the railroad, it was not only the right but the duty of the directors to do so; for they ought in all things to conduct the affairs of the company in the manner which in their judgment is best calculated to protect its rights and advance its welfare. And anything done by them within the scope of their authority is final and conclusive; and none of their acts can afterwards be repudiated or annulled by the company, merely because the end proves that

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the means resorted to were inexpedient or disastrous in their operation. Even therefore if it could now be shown that it would have been to the advantage of the company that the bonds for $ 285,650 should have been retained uncancelled and undischarged, that consideration would have no tendency to show that they are now outstanding and valid claims against the obligors on the property formerly pledged to secure their payment. It is sufficient that they have in fact been cancelled and extinguished by those who had a right to determine what disposition should be made of them.

As to the interest coupons mentioned in schedules numbered 4 and 5, there is no ground upon which the Boston and New York Central Railroad Company were entitled to prove them against the trustees of the Norfolk County Railroad Company, so as to share in the fund in their hands derived from the working of the road. These coupons do not constitute any contract of themselves; they are merely memoranda which are received by the obligees as evidence that the bearer of them is entitled to the amount specified in each, as interest which has accrued upon the bond to which it was attached. Considering the relation between the old and the new corporation, and that the taking up of any such interest coupon by the latter, or paying the amount expressed in it, has the effect of relieving to that extent their mortgaged property, and that this must so far operate for their benefit, the legal conclusion is unavoidable, that this is the payment of interest, and not the purchase of an outstanding debt or cause of action, which could be the subject of transfer and assignment. Such a payment cannot entitle the defendants to set it up afterwards as a claim, or to prove it as a still subsisting debt.

2. As to the bonds mentioned in schedule numbered 2, to the allowance of which by the master objection is made by Chaddock, Urann and others, holders of other bonds, it is plain that they are still outstanding, and are therefore entitled to share in the funds in the hands of the plaintiffs as trustees of the Norfolk County Railroad Company. These bonds were, in pursuance of the vote of the board of directors of the Boston and New York

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Central Railroad Company, placed in the hands of the president, to be used temporarily by him as collateral security, whenever he should think proper to do so. In pursuance of that authority, they were afterwards reissued for the benefit of the corporation. They came into the hands of *bona fide* holders for a valuable consideration, and they have never been redeemed, or in any way paid, extinguished or cancelled. The proof of these was therefore properly allowed as part of the indebtedness of the Norfolk County Railroad Company, and secured by their mortgage.

3. In the same manner the bond for five thousand dollars, now held by the Long Island Railroad Company, should have been allowed. The report of the master disallowing it was therefore erroneous; and his report must be so far reformed and amended as to add this item to the claims which are to participate in the distribution of the earnings of the Norfolk County Railroad in the hands of the plaintiffs.

4. The disallowance by the master of interest upon the interest coupons, after payment demanded thereof, was correct. Interest upon interest which has accrued upon contracts upon which interest is by its terms payable at stated periods, before the principal becomes due, is never allowed in making up judgment in suits thereon. This has often been determined, and must now be considered as the settled law in this commonwealth upon that subject. *Hastings* v. *Wiswall*, 8 Mass. 455. *Wilcox* v. *Howland*, 23 Pick. 167. *Henry* v. *Flagg*, 13 Met. 64.

The conclusion therefore upon the whole case is, that the master's report, amended as before mentioned in reference to the claim of Long Island Railroad Company, is approved and accepted; and a decree for the distribution of the funds, in the hands of the plaintiffs as trustees under the mortgage made by the Norfolk County Railroad Company, from the earnings of the road, is to be entered according thereto.

Decree accordingly.

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CHARLES P. TALBOT & another *vs.* CHARLES HUDSON & others.

The determination of the legislature is not conclusive that a purpose for which it directs private property to be taken is a public use; but is conclusive, if the use is public, that a necessity exists which requires the property to be taken.

In order to constitute a public use which will justify the taking of private property, it is not essential that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the purpose for which the property is appropriated.

A statute, providing that a large tract of land, situated in different towns and owned by a large number of persons, and overflowed by means of a dam, may be redeemed by the removal of the dam by public officers, and compensation paid out of the treasury of the Commonwealth to persons whose property is thereby injured, is a constitutional exercise of the power of taking private property for public uses.

In a statute taking private property for public uses, a provision for the assessment of damages to the owners thereof, and the payment of the same by warrant from the governor out of the treasury of the Commonwealth, is a sufficient provision for the compensation of the owners of the property taken, although the Commonwealth is not liable to be sued.

BILL IN EQUITY, filed in Middlesex by the owners of a mill, mill-dam and water rights upon the Concord River in Billerica, and of adjoining land thereon, to restrain the commissioners appointed by the governor and council under the *St.* of 1860, *c.* 211, from removing the dam erected across that river by the proprietors of the Middlesex Canal, and now belonging to the plaintiffs. A temporary injunction was issued *ex parte* on the filing of the bill, which the defendants afterwards moved to dissolve. Upon this motion the case was reserved, with the consent of the parties, for the consideration of the full court, and is sufficiently stated in the opinion.

B. *F. Thomas & J. G. Abbott*, (*G. H. Preston* with them,) for the plaintiffs, to the point that the statute was not a lawful taking of private property for public uses, cited Declaration of Rights, arts. 1, 10, 30; *Winslow* v. *Gifford*, 6 Cush. 327; *Cushman* v *Smith*, 34 Maine, 247; *Vanhorne* v. *Dorrance*, 2 Dall. 310; *Wilkinson* v. *Leland*, 2 Pet. 657; *In re Albany Street*, 11 Wend. 151; *Bloodgood* v. *Mohawk & Hudson River Railroad*, 18 Wend. 9; *Embury* v. *Conner*, 3 Comst. 511; *People* v. *Mayor &c. of Brooklyn*, 4 Comst. 419, 430, 431; *Taylor* v. *Porter*, 4 Hill, 140; *Woodruff* v. *Fisher*, 17 Barb. 224; *Norman* v. *Heist*,

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5 W. & S. 171; *Moale* v. *The Mayor &c. of Baltimore*, 5 Maryland, 314; *Harding* v. *Goodlett*, 3 Yerger, 41, 52; 2 Kent Com. (6th ed.) 416 - 419; Sedgwick on Stat. & Const. Law, 514, 515; and to the point that the act provided no reasonable compensation, further cited *Decatur* v. *Paulding*, 14 Pet. 497: *Brashear* v. *Mason*, 6 How. 92; *Reeside* v. *Walker*, 11 How. 272; *Cohens* v. *Virginia*, 6 Wheat. 411, 412; *United States* v. *Clarke*, 8 Pet. 444; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 321; *Bonaparte* v. *Camden & Amboy Railroad*, Bald. 205; *Hartwell* v. *Armstrong*, 19 Barb. 171; *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501; Gen. Sts. *c.* 15, §§ 30, 31; 1 Kent Com. 322 note; 2 Kent Com. 389, 417; Sedgwick on Stat. & Const. Law, 526 - 528, 533.

S. H. Phillips, (Attorney General,) *& J. S. Keyes*, for the defendants, referred to some of the cases cited in the opinion, and also to *Sts.* 1783, *cc.* 20, 21; 1795, *c.* 67; 1797, *c.* 67; 1803, *c.* 98; 1809, *c.* 19; 1812, *c.* 113; 1845, *c.* 117; 1856, *c.* 289; Gen. Sts. *c.* 43, §§ 59, 76; *cc.* 148, 149; *Hickman's case*, 4 Harrington (Del.) 580; *Stoughton* v. *Baker*, 4 Mass. 522; *Commonwealth* v. *Breed*, 4 Pick. 460; *Commonwealth* v. *Chapin*, 5 Pick. 199; *Commonwealth* v. *Alger*, 7 Cush. 53, 86, 100, 102; *Commonwealth* v. *Temple*, 14 Gray, 69; *Stevens* v. *Middlesex Canal*, 12 Mass. 466; *Heard* v. *Middlesex Canal*, 5 Met. 81; *Heard* v. *Talbot*, 7 Gray, 118; *District Attorney* v. *Lynn & Boston Railroad*, *ante*, 242.

Bigelow, C. J. This case comes before us for a hearing upon the bill and answer, somewhat out of the regular course of proceedings in chancery. A preliminary injunction was heretofore issued *ex parte* by a justice of this court on the filing of the bill. Upon the return of the subpœna, a motion to dissolve this injunction was made by the defendants. This motion should properly have been heard, in the first instance, by a single judge. But as the case of the plaintiffs, as stated in the bill, mainly depends on the determination of certain questions of law which can in no way be affected by proof, and as the case is one of great importance, involving large interests both of a public and private nature, it was agreed by the parties, with the

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assent of the court, that these questions should now be heard and finally determined.

The case, so far as is necessary to an understanding of these questions, may be briefly stated thus: The plaintiffs allege that they are owners by purchase of a valuable mill privilege, water rights and dam, situated in the northern part of the town of Billerica upon the falls of the Concord River, with land in, upon and adjoining the same; that they have erected on said river, at great cost, large mills and other buildings, used and improved by them for the manufacture of various articles; that these mills are carried on and operated by the water power created by said dam and river, and are entirely dependent thereon. They further aver that the defendants, assuming to act as commissioners under and by virtue of the authority conferred by a certain act of the legislature, passed on the 4th of April 1860, entitled "an act in relation to the flowage of the meadows on Concord and Sudbury Rivers," propose to take down and remove said dam to a level thirty three inches below the top thereof, by which the water power, dam and mills of the plaintiffs will be destroyed, or rendered of little or no value, and that they will thereby be subjected to serious and irreparable loss, for which the defendants would be unable to recompense them, and of such a nature that they are remediless except by relief in equity. They then aver that said act of the legislature is unconstitutional and void, and furnishes no real authority for the threatened action of the defendants as commissioners under its provisions. The defendants, in their answer, admitting that the plaintiffs are owners of the dam, water rights, mill privileges and mills, as stated by the bill, and alleging their due appointment and qualification to act as commissioners under the act of the legislature aforesaid, aver, among other things, that said act is valid and constitutional, and well authorizes them to proceed in removing a portion of said dam in pursuance of its provisions; and they demur to the bill on the ground that the plaintiffs do not state a case which entitles them to relief in equity.

It is manifest from these averments and denials that the right

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of the plaintiffs to the relief which they seek depends chiefly on the allegation of the invalidity of the act of the legislature under which the defendants claim to derive their authority to reduce the height of the dam in the manner set out in the bill. This question has been very fully and elaborately discussed at the bar, and we have endeavored to bestow upon it very careful and deliberate consideration, not only on account of the important nature of the interests involved in our decision, but also because it requires us to determine whether the legislative department of the government has not exceeded the constitutional limits of its authority.

It is quite obvious that the first step in this inquiry is to ascertain, if we can, under what head or branch of legislative power or authority the act in question falls. The intention of the legislature in this respect must be gathered mainly from the terms of the statute. There is no express declaration of the objects contemplated by it, but they are left to implication. Looking to the general structure of the act and the nature of its provisions, we cannot doubt that it was intended as an exercise of the right of eminent domain. It is similar to other legislative acts which authorize the taking of private property for a public use. It expressly authorizes the taking and removal of the dam by a board of public officers appointed for this specific purpose; it provides the same remedy in behalf of persons injured by such taking and removal as is given in case of damages occasioned by the laying out of highways; it affords to the party aggrieved by the award of the commissioners a trial by jury, and confers on this court the power to hear and determine all questions of law arising in the proceedings, and to set aside the verdict of the jury for sufficient cause. These provisions are inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in the legislature, or in order to prohibit a use of it which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners to take down and

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remove the dam, or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions when the legislature intend to exercise the right to take it for a supposed public use. *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501. *Commonwealth* v. *Tewksbury*, 11 Met. 55.

Such being the manifest design of the legislature in passing the act in question, we are brought directly to a consideration of the objections urged by the plaintiffs against its validity. The first and principal one is that it violates the 10th article of the Declaration of Rights, because it authorizes the taking and appropriation of private property to a use which is not of a public nature.

In considering this objection, we are met in the outset with the suggestion, that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will or judgment of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the Constitution, that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that when it is appropriated to public uses he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should by statute take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, where this power is exercised, it neces-

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sarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. That is a power in its nature essentially judicial, which they are by article 30 of the Declaration of Rights expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits prescribed by the Constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected, when they are invaded by legislative acts which go beyond the limitations imposed by the Constitution.

But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the lawmaking power has transcended its authority, or committed under the form of law a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right. If they fail to do so, or leave room for a reasonable doubt upon the question whether it is an infringement of any of the guaranties secured by the Constitution, the presumption in favor of the validity of the act must stand. *Opinion of Justices*, 8 Gray, 21. Besides, it is a well settled rule of exposition that in considering whether a statute is within the limits of legislative authority, if it may or may not be valid according to circumstances, courts are bound to presume the existence of those circumstances which will support it and give it validity. *Wellington, Petitioner*, 16 Pick. 96.

The ultimate purpose which the legislature had in view in passing the act under consideration does not distinctly appear by the terms of the act itself. But it may be inferred from the title of the act and the general scope of its provisions, that it

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was intended to relieve the meadows lying on the borders of Concord and Sudbury Rivers, chiefly in the towns of Lincoln, Concord, Sudbury and Wayland, from large quantities of water with which they are constantly overflowed, and which are supposed to be set back by the dam owned by the plaintiffs. This purpose is quite clearly indicated by the provisions in the fourth section of the act, by which the removal of the dam under the act is made to operate as a bar to any suits by the proprietors of lands flowed thereby for damages sustained in consequence of such flowage. And indeed it is conceded by the parties that such was the main purpose of the statute.

In many cases, there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal or a highway, it would clearly fall within the first class; if it is transferred from one person to another or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. In the present case there can be no doubt that every owner of meadow land bordering on these rivers will be directly benefited to a greater or less extent by the reduction of the height of the plaintiffs' dam. The act is therefore in a certain sense for a private use, and enures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are therefore to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or

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benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found, then we are bound to suppose that the act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property. If a use in its nature public can be subserved by the appropriation of a portion of the plaintiffs' dam in the manner provided by this act, it was clearly within the constitutional authority of the legislature to take it, and in the absence of any declared purpose, we must assume that it was taken for such legitimate and authorized use.

The geographical features of the Concord and Sudbury Rivers are properly within the judicial cognizance of the court. They are stated in detail in the opinion of the court in *Sudbury Meadows* v. *Middlesex Canal*, 23 Pick. 45. From that case and an inspection of the map, it appears that these two rivers, forming parts of the same stream, pass for a distance exceeding twenty miles through a tract of country, forming their banks or borders, consisting chiefly of meadows comprising many hundreds of acres; that throughout this extent the waters are very sluggish, having only a slight fall, until they reach the plaintiffs' dam. It might well be supposed that the necessary effect of an obstruction in a stream of this nature would be to cause the waters to flow back in the bed of the rivers, to fill up their courses or channels, to overflow their sides, and to inundate to a great extent the adjacent land, which is naturally low and level, and thus to render it unfit for agricultural purposes and deprive it of its capacity to produce any profitable or useful vegetation. The improvement of so large a territory, situated in several different towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of all pub-

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lic utility and advantage as to make it the duty of this court to pronounce a statute, which might well be designed to effect such a purpose, invalid and unconstitutional. The act would stand on a different ground, if it appeared that only a very few individuals or a small adjacent territory were to be benefited by the taking of private property. But such is not the case here. The advantages which may result from the removal of the obstruction caused by the plaintiffs' dam are not local in their nature, nor intended to be confined to a single neighborhood. They are designed to embrace a large section of land lying in one of the most populous and highly cultivated counties in the State, and by increasing the productive capacity of the soil to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.

It is on this principle, that many of the statutes of this Commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents, coeval with the origin

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and adoption of the Constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence. One of the earliest and most familiar instances of the exercise of such power under the Constitution is to be found in St. 1795, *c.* 74, for the support and regulation of mills. By this statute the owner of a mill had power, for the purpose of raising a head of water to operate his mill, to overflow the land of proprietors above and thereby to take a permanent easement in the soil of another, to the entire destruction of its beneficial use by him, on paying a suitable compensation therefor. Under the right thus conferred, the more direct benefit was to the owner of the mill only; private property was in effect taken and transferred from one individual for the benefit of another; and the only public use, which was thereby subserved, was the indirect benefit received by the community by the erection of mills for the convenience of the neighborhood, and the general advantage which accrued to trade and agriculture by increasing the facilities for traffic and the consumption of the products of the soil. Such was the purpose of this statute, as appears from the preambles to the provincial acts of 8 and 13 Anne, from which the statute of 1795 was substantially copied. It is thereby declared that the building of mills has been "serviceable for the public good and benefit of the town or considerable neighborhood." Anc. Chart. 388, 404.

In like manner, and for similar purposes, acts of incorporation have been granted to individuals with authority to create large mill powers for manufacturing establishments, by taking private property, even to the extent of destroying other mills and water privileges on the same stream. *Boston & Roxbury Mill Dam* v. *Newman*, 12 Pick. 467. *Hazen* v. *Essex Co.* 12 Cush. 478. *Commonwealth* v. *Essex Co.* 13 Gray, 249. The main and direct object of these acts is to confer a benefit on private stockholders who are willing to embark their skill and capital in the outlay necessary to carry forward enterprises which indirectly tend to the prosperity and welfare of the community. And it is because they thus lead incidentally to the

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promotion of "one of the great public industrial pursuits of the Commonwealth," that they have been heretofore sanctioned by this court, as well as by the legislature, as being a legitimate exercise of the right of eminent domain justifying the taking and appropriation of private property. *Haxen* v. *Essex Co.* 12 Cush. 475.

It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the State by allowing individuals acting primarily for their own profit to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed it would seem to be most reasonable, and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use and subjected to a servitude or easement by which its value has been impaired and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interest of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill-owner to raise a dam and flow the land of adjacent proprietors has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land by taking down the dam and rendering the land available for agricultural purposes would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam on making suitable compensation to the owner. It would only be to apply

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to the mill-owner for the benefit of agriculture the same rule which had been previously applied to the land-owner for the promotion of manufacturing and mechanical pursuits.

Nor are we without precedent for acts of legislation by which private property has been taken for the purpose of improving land and rendering it fertile and productive. The St. of 1795, *c.* 62, for the improvement of meadows, swamps and low lands, recognizes the right of taking private property for the purpose of redeeming lands from the effects of stagnant water and of being overflowed by obstructions in brooks and rivers. This statute, re-enacted by the Rev. Sts. *c.* 115, has been long in use, and many proceedings under it have taken place, some of which have passed under the judicial cognizance of this court. But in none of these has the validity of the statute been doubted or denied. *Coomes* v. *Burt*, 22 Pick. 422. *Day* v. *Hulburt*, 11 Met. 321. Under the provisions of this act, not only is it competent to drain or overflow the land of a proprietor without his assent, and to compel him to pay a portion of the expense attendant on the proposed improvement, but also to open the flood-gates of any mill or make needful passages through or round the dam thereof and erect temporary dams on the land of any person who is not a proprietor or a party to the proceedings. For the injury thus occasioned to private property, a remedy is provided by the statute. But it is clearly an appropriation of private property primarily for the benefit of the owners of the meadows or low lands which are intended to be improved, and where the public use or benefit which justifies such appropriation consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the land.

It was suggested at the argument, that there was an essential difference between the provisions of statute for the improvement of meadows and low lands and that under consideration, because by the former it was provided that the damages should be paid by the parties benefited, whereas by the latter they are to be paid out of the public treasury. But we cannot see

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the force or bearing of this suggestion. The mode of compensating the party whose property is taken cannot affect the validity of the appropriation, so far as it depends on the question, whether it was taken for a public use. If the use is not in its nature public, the appropriation is invalid and unconstitutional, and the mode by which compensation to the owners of land taken is to be made is wholly immaterial. It is only when property is taken for a purpose for which it may be constitutionally appropriated, that it becomes necessary to determine whether provision is made for compensation, suitable and adequate to furnish a remedy to the party injured.

But if there were no precedent for such legislation, and if we were unable to see that any use in its nature public could be effected by the exercise of the power conferred on the commissioners by the terms of the act under consideration, we should be slow to decide, on the case as stated in the bill, that the statute was invalid, and that the legislature in passing it transcended their constitutional authority. The burden of establishing this proposition is on the plaintiffs. They are bound to make such averments in their bill, either by way of allegations of fact or conclusions of law, as *prima facie* to make it appear that the act has no force or validity. This is the basis on which their whole case rests. It is not sufficient to aver that the act is unconstitutional; because the presumption is in favor of its validity, and there is nothing on the face of the act which necessarily leads to the inference that it violates the rights of the plaintiffs. But on looking into the allegations of the bill, it does not appear that any facts are set forth which sustain the averment of the invalidity of the statute. It is not stated that the property of the plaintiffs is not taken for a public use, and that no public purpose can be accomplished by the reduction of the dam. The only allegation, having reference to the purpose of the act, is that it was designed to relieve certain meadows situated on the Concord and Sudbury Rivers from water alleged to be set back by the dam of the plaintiffs, and that this object will not be effected by the proposed reduction of the height of the dam, if the same shall be carried into effect. But it does not aver

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that the relief of these meadows from the water with which they are overflowed is not an object of public utility for which private property may be taken. It is immaterial whether this object will be accomplished by the means proposed; that question was for the legislature to determine; the essential point which the plaintiffs must establish is, that the property was not taken or appropriated for a public use. The bill contains no such allegation. Certainly in a hearing on bill and answer, the court cannot assume the act to be unconstitutional, in the absence of any statement of facts or other averments to sustain the allegation that it takes property "for uses and purposes which are in violation of the tenth article of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts." Nor is it to be overlooked in this connection, that the ordinary presumption in favor of the validity of an act of the legislature is greatly strengthened in the present case by the consideration that the power to take the property of the defendants is not delegated to any persons or corporation for their private advantage and emolument, who are to make compensation for the property taken out of their private capital or stock. But it is an exercise of the power of eminent domain directly by the State itself through agents specially appointed for the purpose, and the compensation provided for those whose property may be taken or injured by the reduction of the dam is to be paid from the public treasury. An act thus framed clearly indicates that in the judgment of the legislature it was designed to subserve some important public use, so necessary that it ought not to be left to private enterprise, and so universal that the burden of accomplishing the object should be borne, not by individuals, or corporations or towns, but by all the people of the Commonwealth. We know of no instance in the jurisprudence of this country, where an act, so clearly intended to effect a purpose which was deemed by the legislature to be of public utility, has been adjudged unconstitutional and void. Every reasonable presumption is against such a conclusion, and it would require very strong circumstances to lead the court to overrule the judgment of a co-ordinate branch of the government, so

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unequivocally expressed in a matter primarily within their province to determine.

The validity of the statute is called in question by the plaintiffs on the further and distinct ground that it contains no reasonable, certain and adequate provision for compensation to those whose property may be taken and appropriated in carrying out the purposes of the act. But it seems to us that there is an obvious and decisive answer to this objection. By the third section of the act, it is provided that the damages which may be recovered on due proceedings had by the parties injured shall be paid out of the treasury of the Commonwealth, and the governor is authorized to draw his warrant therefor. This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the act. The provision could not be more explicit or definite as to the amount appropriated. Until the damages are ascertained and adjudicated, the sum which will be required to pay them is necessarily uncertain. There is no provision of law, which makes it requisite to the validity of an appropriation from the treasury of the Commonwealth that a specific sum should be named and set apart as a fund to meet a particular exigency. It is sufficient if by an act or resolve passed during the same or the preceding political year the payment is authorized. *St.* 1858, *c.* 1, §§ 1, 2. Gen. Sts. *c.* 15, §§ 30, 31. That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law. Unless we can say that such a provision affords no reasonable guaranty that the persons injured will receive compensation, we cannot adjudge the statute to be unconstitutional. We certainly cannot assume that the Commonwealth will not fulfil its obligations. The presumption is directly the other way. Indeed the plaintiffs do not aver in their bill that the damages which may be awarded to them under the act will not be duly paid. How then can it be said that no suitable and adequate provision is made in the act, by

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which the plaintiffs can receive the compensation to which they may be entitled? The answer to the argument that no process is provided by which the payment can be secured and enforced is, that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the governor of the Commonwealth upon the public treasury. We are bound to presume that the chief magistrate of the State will perform his duty by drawing his warrant in conformity with the requirements of law, and that payment of a public debt thus created will be duly made in like manner as all public dues and liabilities are paid out of the treasury of the State. The elementary principle that the sovereign can do no wrong is the foundation on which rests the rule, recognized in our jurisprudence, by which the State is exempted from being subject to process at the suit of a creditor. The presumption of law is, that the State will keep its faith inviolate, and honestly fulfil all its obligations. 3 Bl. Com. 255. 4 Bl. Com. 33. Broom's Max. (3d ed.) 51. *Hill* v. *United States*, 9 How. 386. *Injunction dissolved.*

Henry Bedloe & wife *vs.* Isabel Homer.

A testator bequeathed to his daughter A. the sum of one hundred dollars, declaring it to be all that she and her issue could or would ever receive from his estate; to his daughter B. a like sum, and a further sum of five thousand dollars, to be held by trustees and paid to her on her marriage or coming of age, and the income meanwhile paid to her annually; to his wife a legacy of twenty thousand dollars, and the income of a fund of one hundred thousand dollars, out of which he directed her to maintain and educate his daughter B.; and all the rest and residue of his estate to trustees in trust to pay the income to his daughter B. during her life, and upon her death to pay the income and principal to her issue, or, failing such issue, as she might appoint by will. By a codicil the testator ratified his will in all respects except as thereby altered or revoked; expressed a desire that his wife at her discretion should use the income bequeathed to her as well for the benefit of his daughter A. as of his daughter B: and directed that at the death of his wife one half of all his property then remaining and held under his will should be held for the benefit of his daughter A. during her life and at her death go to her children. The testator's wife died before his daughter B. came of age or was married. *Held*, that the codicil revoked the bequest of five thousand dollars in trust for B., and operated upon the testator's whole estate, except the two legacies of one hundred dollars each.

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APPEAL from a decree of the judge of probate, directing the trustees under the will of Fitz Henry Homer to charge themselves with the sum of five thousand dollars to be set apart as a legacy under the will to the testator's daughter Isabel, who was a minor and unmarried. The appellants were the testator's daughter Josephine and her husband. Each of two codicils to the will expressly ratified and confirmed the will in all respects, except as thereby altered or revoked. The case was argued in November 1859. The other facts are stated in the opinion.

J. A. Loring, for the appellants.

W. Minot, Jr., for the appellee, argued that the second codicil did not revoke the legacy of five thousand dollars given by the will to Isabel, because it disposed only of the residue of the estate, and the dispositions of the will were not to be disturbed further than absolutely necessary; and cited 1 Jarman on Wills, 161; *Clarke* v. *Butler*, 1 Meriv. 304; *Roach* v. *Haynes*, 6 Ves. 153; *Briggs* v. *Hosford*, 22 Pick. 288.

MERRICK, J. When this suit was commenced, the wife of the testator had deceased, and all the provisions in his will, and all the trusts created by it, in her behalf, had been fully executed. It remains therefore only to ascertain the rights which it conferred upon each of his children.

The will and codicils, although made and executed at different times, all took effect together upon the death of the testator, and are to be construed as in substance one instrument; the provisions in the latter modifying and controlling those in the former.

By the will, the testator first made provision for his wife, giving to her during her life the use of his mansion house, the sum of twenty thousand dollars to be paid to her in three years after his death, and an income of five thousand dollars to be raised out of a trust fund of one hundred thousand dollars, consisting of his real and personal estate. He then gave one hundred dollars to his daughter Josephine, and to his daughter Isabel a like sum, together with a further sum of five thousand dollars, to be paid to her on her being married or attaining her

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majority, the income of the same sum to be paid to her annually in the mean time by the trustees, by whom it was to be holden. He then gave all the residue of his estate to trustees, in trust to appropriate so much of the income thereof as might be proper to the maintenance and education of Isabel during her minority, the surplus income during that period to be kept in the course and process of accumulation; and, upon her arriving at majority, to pay the whole income, not exceeding however the sum of twelve thousand dollars annually, to her during her life. Upon her decease, if she left no issue, the entire fund was to be paid to the appointees under her will; but if she died leaving issue, the trust was to be continued for their benefit, until all of them should become of full age.

These provisions were essentially modified by the codicils. By the first, he annulled the limitation of the income of the trust fund created in behalf of his wife, and bequeathed the whole of it to her. And in like manner he annulled the limitation of the annual payments to be made to Isabel out of the income arising from the residuum of his estate, devised and bequeathed to trustees for her benefit; and directed that she should receive the whole of it.

The changes made by the second codicil are of still greater importance. In his will he declared that the hundred dollars bequeathed to Josephine was "all that she and her issue can or will ever receive from his estate." But by the provisions of this codicil it is apparent that his intention in regard to her had undergone a complete change. Here he first expresses his desire that his wife should use the income which she should receive from the trust fund of one hundred thousand dollars, created in her behalf by his will, "for the benefit of his daughter Josephine, as well as of his daughter Isabel;" but still leaves it wholly at her discretion. He then adds the important and comprehensive clause, "that at the death of his wife one half of all his property then remaining and held under his will should be held and used for the benefit of his daughter Josephine during her life," and at her death to go to her children. This clause operates upon the entire estate, except the two legacies of one hundred

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dollars to each of his daughters, which were to be paid without limitation of time. It equally applies to, and directs the disposition to be made of, the trust fund created for the benefit of his wife, of the five thousand dollars given to Isabel, and of all the residue of the estate given to trustees to raise an income to be paid to her. And as one half of all these several sums, estates, and funds is thus to be held, from and after the death of the wife of the testator, to and for the use of Josephine during her life, and to be paid and go at her decease to her children, it necessarily and unavoidably operated as a revocation of the legacy of five thousand dollars given in the will to Isabel. The language and direction of the testator in this codicil is so direct and positive, that it seems impossible to misapprehend his intention. This was to place his two daughters upon an entire equality, and to give to each of them individually the same share and proportion of his estate. As this purpose can be effected only by withholding the payment of that legacy to Isabel, and making the amount of it a part of the general residuum of the estate, the implication is clear and inevitable that it was his intention to revoke and annul it. Under the will and codicils, therefore, all the real and personal estate of which the testator died seised and possessed, and which remained at the decease of his wife, was thenceforward to be held in trust, one half for the benefit of Isabel and her issue or appointees, and the other half for the benefit of Josephine and her children.

From these considerations it is a necessary conclusion that the trustees rightly declined to charge themselves with or to set apart the sum of five thousand dollars to be appropriated as a payment of the legacy of that sum to Isabel; and the order and decree of the judge of probate, requiring them to reform their account and to set apart said sum and charge themselves in that manner, was erroneous and must be reversed; and instead thereof, a decree be made that all the said remaining estate be held thenceforward in trust, one half for the benefit of each of said daughters of the testator, upon the terms and according to the directions contained and expressed in the will and codicils relative thereto. *Decree reversed.*

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Thomas B. Coddington & others *vs.* William W. Goddard.

A broker, through whom an offer was made in Boston by a principal doing business in New York, for the purchase of a quantity of copper, was asked by the seller whether intelligence had been received in New York of any advance in the price of copper in Europe, and replied, "None that I know of," and the seller then agreed to sell upon the terms proposed by the broker. Intelligence of such advance in price had in fact been received in New York, and was known to the broker's principal there, before the contract was made, but was not known to the broker; and this intelligence would have been of material importance to the seller in determining whether he would sell on the terms proposed. *Held*, that the contract was valid, and might be enforced against the seller. *Held*, *further*, in an action so to enforce it, that it was not competent for him to show that, at the time the contract was made, there was in the market and among sellers of copper a general expectation that the next steamer, arriving from Europe, would bring intelligence of an advance in the price of copper.

An entry of a contract of sale and purchase, made by a broker in his books, in the regular course of his business, which states the date, the full names of both parties, connected by the word "to" in this form, "W. W. G. to T. B. C. & Co.," a description of the goods sold, and the terms of the bargain, although not subscribed by any one, is a sufficient memorandum in writing, within the statute of frauds.

In an action to enforce a contract for the sale of goods, the only legal evidence of which is an entry in the books of a broker employed to make this single contract, parol evidence is not competent to show that the contract thus stated, if within the broker's authority, was different from the contract actually made through him; but is admissible to show that the contract as thus reduced to writing differs from that which the broker was authorized to make.

At the trial of an action by the purchaser to recover damages for a failure of the seller to deliver a quantity of copper, it appeared that an offer was made to the seller through a broker, for the purchase of three hundred thousand pounds of copper; that after some conversation the seller offered to sell two hundred thousand pounds upon the terms proposed, reserving the right to add one hundred thousand pounds more on the same terms, the next day, if he wished; and that the broker, after saying it was a sale, entered the transaction in his books, as a sale of two hundred thousand pounds, without any mention of a right of the seller to add one hundred thousand pounds more the next day. The presiding judge refused to instruct the jury, as requested by the defendant, that if they found it was part of the agreement that one hundred thousand pounds of copper might be added by the seller on the next day, the broker's entry was insufficient as a memorandum in writing under the statute of frauds; but did instruct them that the broker must record, in all essential particulars, the exact contract he had authority to make; that if they were satisfied that he omitted any essential element of it, there was no valid contract; that the omission to state in the memorandum the defendant's right to add one hundred thousand pounds would not invalidate the contract, unless they should find that the sale of the two hundred thousand pounds depended upon the right to deliver the one hundred thousand pounds additional on the next day; but that if they should find that the right to deliver the one hundred thousand pounds was made a condition of the bargain, and was so far an element of it, that none of it was to be binding unless this was, then the omission to insert it in the memorandum would be fatal to the action. *Held*, that the defendant had no ground of exception.

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ACTION OF CONTRACT to recover damages for not delivering two hundred thousand pounds of copper alleged to have been sold by the defendant to the plaintiff. Trial and verdict for the plaintiff before *Merrick*, J., who reported the case to the full court, in substance as follows:

Charles Canterbury, called as a witness for the plaintiffs, testified that he was a merchandise broker; that on the 9th of December 1856, acting under instructions contained in a telegraphic despatch from the plaintiffs, merchants in New York, which he received between two and three o'clock in the afternoon, he called at the defendant's place of business in Boston, and not finding him there, followed him to his house, where he had an interview with him, and stated to him the plaintiffs' offer to buy three hundred thousand pounds of copper, at twenty four and a quarter cents per pound, on a credit of nine months, with satisfactory paper, and deliverable on board a vessel in Boston bound for New York, the seller to pay freight to New York, and the buyer to pay the insurance; that the defendant asked if the steamer, which had that day arrived in New York, brought intelligence of any advance in the price of copper in Europe; to which the broker replied, "None that I know of;" and the defendant, after a moment's hesitation, said that he would sell to the plaintiffs two hundred thousand pounds of copper on the terms proposed, reserving the right to add one hundred thousand on the next day if he should then elect to do so; that the broker urged him to sell the whole of the three hundred thousand pounds then, saying that the purchase was made for exportation, and would take that quantity out of this market; but the defendant said he would not do differently from what he had proposed; and the broker then said, "Well, if that is the ultimatum, it is a sale," and, returning to his office, communicated to the plaintiffs by telegraph what he had done, informing them that he should write the particulars by the next mail; which he did; and made a memorandum in his books of the transaction, according to his usual custom.

This memorandum was on a page of a book headed, "Boston, December 1856," and was in the following terms:

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"9th. W. W. Goddard to T. B. Coddington & Co. 200,000 pounds Chili pig copper, 24¼ a 9 mos. from delivery, f. o. b. packet here for N. Y., seller paying freight, and buyer paying insurance to N. Y. To be 96 per cent. pure copper, and paper satisfactory to seller."

The broker testified that in this memorandum the figures denoting the quantity were written in pencil, in order to facilitate alteration in case the defendant should, as he had a right to do, elect to deliver a larger quantity. No sale note or letter relating to the sale or entry was sent by the broker to the defendant.

The plaintiffs admitted that, before sending their telegraphic despatch to the broker on the 9th of December, they had received intelligence by the steamer, which arrived that morning in New York, of an advance of a penny a pound in the price of copper in Europe; that this intelligence would have been of material importance to the defendant in determining whether to sell upon the terms proposed; and that if it had been known to him he would not have agreed to sell his copper upon those terms; and that they did not communicate it to the defendant or to the broker until after the completion of the bargain. The defendant conceded that the broker, at the time of his interview with him, was ignorant of the arrival in New York of intelligence of an advance in the price of copper; and did not contend that the broker had any fraudulent design or purpose in making the entry in his books, or fraudulently omitted in the entry any of the terms of the bargain agreed upon. But the defendant did contend that by reason of the broker's answer that no such intelligence had arrived to his knowledge, and of the omission of the plaintiffs to communicate that intelligence to the defendant, the bargain made by him with the broker as the agent of the plaintiffs was not binding upon him. And this objection was reserved for the determination of the full court, the parties agreeing that if for this reason the action could not be maintained, the verdict should be set aside and a nonsuit entered.

The defendant, being called as a witness, testified that in his interview with the broker he said that he would sell to the

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plaintiffs two hundred thousand pounds of copper in case no intelligence had been received by the steamer of any advance in the price of the article in Europe, reserving the right to add one hundred thousand pounds the next day on the same terms at his option. And he contended that, if there was any verbal contract for the sale of two hundred thousand pounds of copper, it was upon this condition, and upon the further condition that the copper, if sold and delivered, should be exported by the plaintiffs, and therefore the plaintiffs could not recover.

The defendant also contended that the entry in the broker's books was not a sufficient memorandum in writing to take the case out of the statute of frauds; because no authority was shown in the broker to sign the memorandum in his behalf or in behalf of the plaintiffs; because it was not intended by the broker, when he made it, as a complete and final statement of the bargain made; because it did not state all the material terms of the bargain; because it was not signed as required by the statute; and because the broker was not authorized by the defendant to make the bargain so entered by him.

But the judge ruled that if Canterbury was a merchandise broker, and that was known to the parties, and they were dealing with him in this transaction in his capacity of broker, and made a contract through him for the purchase and sale of two hundred thousand pounds of copper, this gave him authority to bind them both by making a memorandum of the contract in writing, and signing it in their behalf respectively; that the memorandum in his book was sufficient in form to bind the parties, if he had authority to make and sign it for them; that if he did, in fact, make the entry in his book as and for a complete note or memorandum of the contract of sale made by the parties through him, such memorandum was conclusive evidence of the terms of the contract, and was to be considered and treated in all respects as if it was a written contract signed by the parties themselves; that it was in its terms a perfect and complete statement of a contract, and capable of a clear and intelligible exposition, and therefore parol evidence was inadmissible to contradict or vary the terms of it; and that even if

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the defendant did in his verbal contract with Canterbury make the sale upon such conditions as he contended, he could not avail himself of either of those conditions, because they were not contained or expressed in the memorandum. To these rulings the defendant alleged exceptions.

C. B. Goodrich & O. G. Peabody, for the defendant. The concealment by the plaintiffs from the defendant of the material fact that intelligence of an advance in the price of copper in Europe had been received avoids, at the election of the defendant, any contract of sale. The ignorance of the agent cannot be set up by the principal, who was not ignorant. *Wilde* v. *Gibson*, 1 H. L. Cas. 615. *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. *National Exchange Co.* v. *Drew*, 2 Macq. 103. *Fuller* v. *Wilson*, 2 Gale & Dav. 460; 3 Gale & Dav. 570; 3 Ad. & El. N. R. 58, 68, 1009. *Polhill* v. *Walter*, 3 B. & Ad. 114. *Russell* v. *Thornton*, 4 H. & N. 788. *Hazard* v. *Irwin*, 18 Pick. 108, 109. *Carpenter* v. *American Ins. Co.* 1 Story R. 57. *Fitzsimmons* v. *Joslin*, 21 Verm. 129. *Olmsted* v. *Hotailing*, 1 Hill N. Y. 317. *Elwell* v. *Chamberlain*, 2 Bosw. 230. *Crump* v. *United States Mining Co.* 7 Grat. 352. 2 Kent Com. (6th. ed.) 621 note. Smith Merc. Law, (Amer ed.) 142. Russell on Factors, 88 – 90. Parsons Merc. Law, 152. Story on Sales, § 175. Story on Agency, § 389. Paley on Agency, (4th Amer. ed.) 325.

The entry in the broker's book is insufficient, because, 1st. It does not show who is buyer and who seller. 2 Kent Com. 511. *Bailey* v. *Ogden*, 3 Johns. 399. *Sherburne* v. *Shaw*, 1 N. H. 157. *Champion* v. *Plummer*, 1 New Rep. 252. *Elmore* v. *Kingscote*, 5 B. & C. 583. 2d. It does not state in what sum, nor in whose name, nor for whose benefit, the copper was to be issued; nor when, where or by what test the assay of the copper was to be made. 3d. It does not mention the defendant's right to add one hundred thousand pounds. 4th. It is not signed by the broker. *Goom* v. *Aflalo*, 6 B. & C. 117. *Heyman* v. *Neale*, 2 Campb. 337. *Smith* v. *Sparrow*, 2 Car. & P. 544. *Grant* v. *Fletcher*, 5 B. & C. 436. *Henderson* v. *Barnewall*, 1 Yo. & Jerv. 387. *Thornton* v. *Charles*, 9 M. & W. 802. *Sieveright* v.

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Archibald, 17 Ad. & El. N. R. 102. *Davis* v. *Shields*, 26 Wend. 341. *Dennison* v. *Carnahan*, 1 E. D. Smith, 144. The mention of the names of the parties at the top of the entry by the broker is not a sufficient signature. *Cabot* v. *Haskins*, 3 Pick. 83. *Hawkins* v. *Chace*, 19 Pick. 505. *James* v. *Patten*, 2 Seld. 11. *Merritt* v. *Clason*, 12 Johns. 102, and 14 Johns. 484. *Davis* v. *Shields*, 26 Wend. 341. *Propert* v. *Parker*, 1 Russ. & Myl. 625. *Holmes* v. *Mackrell*, 3 C. B. (N. S.) 789. *Lobb* v. *Stanley*, 5 Ad. & El. N. R. 574.

The ruling that parol evidence was incompetent to show that the defendant agreed to the sale upon conditions not expressed in the entry was erroneous. *Davis* v. *Shields*, 26 Wend. 364 – 366. *Goodman* v. *Griffiths*, 1 H. & N. 574. *Pym* v. *Campbell*, 6 El. & Bl. 370. *Pitts* v. *Beckett*, 13 M. & W. 743. Russell on Factors, 75, 78, 79, 86.

C. A. Welch & E. Bangs, for the plaintiffs.

Bigelow, C. J. We can see nothing in the facts disclosed at the trial, which shows any misrepresentation or concealment in procuring the assent of the defendant to the contract of sale set out in the declaration. Assuming the rule of law to be, as stated by the counsel for the defendant, that a contract, made by an agent in behalf of a vendee, his principal, into which the vendor was induced to enter by a representation, which was false within the knowledge of the principal, but not so within that of the agent, would be void on the ground of fraud, we do not think the evidence brings the case at bar within this principle. The broker did not make any representation or statement in behalf of the plaintiffs or as their agent. He was not asked concerning their knowledge of any fact or circumstance bearing on the contract which he was endeavoring to negotiate with the defendant. It is true that he was interrogated concerning a material fact, but the question was addressed to him individually and sought to draw out only his own personal knowledge, and not that of his principals upon the subject to which it related. Clearly it was so understood between the parties. The answer given to it, which the defendant received at the time as satisfactory, was expressly confined to the broker's own indi-

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vidual information, and did not either affirm or deny any fact absolutely, or import, either directly or by implication, any knowledge of it on the part of the plaintiffs. This answer was strictly true, and did not tend in any degree to deceive or mislead the defendant. It is not a case, therefore, where an agent made any absolute representation of a material fact which he believed to be true, though it was in fact false and known to be so by his principals. Such would have been the aspect of the case, if he had stated to the defendant, in answer to his inquiry, that the steamer which had that day arrived in New York had brought no intelligence of any advance in copper. Then the cases in which the authority of *Cornfoot* v. *Fowke*, 6 M. & W. 358, has been questioned and denied, would have been applicable. *Fuller* v. *Wilson*, 2 Gale & Dav. 460; 3 Gale & Dav. 570; 3 Ad. & El. N. R. 58, 68, 1009. *Fitzsimmons* v. *Joslin*, 21 Verm. 129. But, as the case stands, upon the proof there was no affirmation or denial by the agent of the existence of this fact or even of the knowledge of his principals concerning it. There was nothing more than a statement that no such fact was known to him. This is admitted to have been true; clearly then there was no misrepresentation or concealment by which the contract can be avoided.

There can be no doubt that the broker, if he acted as the agent of both parties in completing the contract of sale, was empowered to do all that was necessary to make the bargain valid and binding in law. For this purpose he had authority to make the requisite memorandum to satisfy the statute of frauds. Rev. Sts. *c.* 74, § 4. It is not denied that this memorandum may well be made in the book of a broker. Indeed, such entry may be resorted to as the original evidence of the contract, even when bought and sold notes of the bargain, differing from each other, have been delivered to the parties. *Sievewright* v. *Archibald*, 17 Ad. & El. N. R. 102, 109.

But it is objected that the memorandum made by the broker in the present case was insufficient to take the case out of the operation of the statute, because it does not show who were the vendor and vendee of the merchandise. This would be a

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fatal objection if it was well founded; for although a memorandum of this nature may be very brief, it must nevertheless show with reasonable certainty who were the parties to the contract, and the terms of the sale, so that they may appear from the writing itself. But in the present case the entry is perfectly intelligible and free from doubt. If it is read with reference to the book in which it is made, as an entry by a broker in the regular course of his business as an agent of third parties for the purchase and sale of goods, it clearly indicates a sale from defendant to the plaintiffs. It is susceptible of no other interpretation.

It is also objected that the memorandum is deficient, because it does not state the amount for which insurance was to be procured, nor for whose benefit, and because it contains no stipulation concerning the mode or place in which the assaying of the copper was to be had, in order to ascertain its purity. The answer to these objections is that the memorandum states with accuracy the terms of the contract as testified to by the broker, and that there was no proof at the trial that there was any agreement made concerning the particulars of the bargain which are now alleged to be omitted.

Nor does it affect the validity of the memorandum, that the broker did not include in it the stipulation made by the defendant, that he should have the right to add to the sale one hundred thousand pounds of copper the next day. This was a wholly separate and independent agreement, which in no way affected the sale actually made, and which could not be properly entered in the book of the broker, unless it had ripened into a sale by the election of the defendant on the next day to sell the additional quantity to the plaintiffs. But he made no such election, and there was therefore no contract as to that portion of the copper of which the broker was empowered to make a memorandum.

The remaining objection to the sufficiency of the entry in the book as a memorandum within the statute is that it was not duly signed by the broker or the parties. We know of no case in which it has been held that the signature of the name

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of the agent through whom the contract is negotiated should appear in the writing. It is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some persons duly authorized to authenticate the document. Brokers and auctioneers are deemed to be the agents of both parties, and by virtue of their employment stand in such relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency. Such authority is implied from the necessity of the case; because without it they could not complete a contract of sale so as to make it legally binding on the parties. Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract, by which one agrees to sell and the other to buy the goods or merchandise specified, upon the terms therein expressed. It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered, if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof. *Penniman* v. *Hartshorn*, 13 Mass. 87. *Hawkins* v. *Chace*, 19 Pick. 502, 505. *Fessenden* v. *Mussey*, 11 Cush. 127. *Morton* v. *Dean*, 13 Met. 385. *Salmon Falls Manuf. Co.* v. *Goddard*, 14 How. 446.

The only other exception taken to the ruling of the court presents a question of some difficulty. To understand it, it is necessary to recur to the positions assumed by the respective parties at the trial. The plaintiffs contended and offered evidence to show that the sale was an absolute one, and was made upon the terms set out in the written memorandum. The defendant, on the other hand, insisted and endeavored to prove that the contract of sale was a conditional one, and was not to take effect, if intelligence had been received by the steamer of an advance in the price of copper, nor unless the plaintiffs should agree to export it, if the sale and delivery were completed. In this state of the case, one of the points urged by the defendant was that the broker had no authority to bind him by the mem-

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orandum, which was offered in evidence. Among the instructions given to the jury, they were told that if the defendant did, in his verbal contract entered into with Canterbury, make the sale on the conditions above stated, he could not avail himself of either of them, because they were not contained in the written memorandum made by the broker. This instruction was strictly accurate as applied to the contract, if it was made by the authorized agent of both the parties. But upon the issue whether the broker was authorized to sign the memorandum offered in proof as the agent of the defendant, it shuts him out from the benefit of testimony which has a direct and material bearing. Upon the facts as they appear in the report of the case, the broker was not the general agent of the defendant. He had no authority to bind him, except such as was derived from the verbal contract into which he entered for the sale of the copper. He was in the strictest sense a special agent for a special and single object, and could not bind the defendant beyond the limits conferred by the precise terms of the agreement to which he assented. He was his agent only to sign a memorandum which contained the whole contract, with the terms and conditions annexed to it by him. A broker, from the very nature of his employment, has only a limited authority, when it appears, as it does in the present case, that he had no relation to a party, other than what is derived from a single contract of sale. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further, and he cannot be regarded as his agent, unless he complies with the terms of his special authority as derived from the contract. In short, a broker is authorized to sign only that contract into which the vendor has entered, not another and different contract. If he omits to include in the memorandum special exceptions and conditions to the bargain, he signs a contract which he has no

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authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to sign that contract. It would seem to follow as a necessary consequence that evidence of the verbal agreement into which the defendant entered for the sale of the copper was competent and material on the question of the extent of his authority to bind the defendant.

Nor does the admission of this evidence for this purpose at all contravene the rule, that parol proof is incompetent to vary or control a written contract. It is offered for a wholly different purpose. It bears solely on a preliminary inquiry. The object is not to explain or alter a contract, but to show that no contract was ever entered into, because the person who executed it had no authority to make it. The authority of an agent may always be shown by parol; but the contracts into which he enters within the scope of his authority, when reduced to writing, can be proved only by the writing itself.

The necessity of admitting evidence of the verbal contract entered into with a broker, in cases where his authority is drawn in question, is quite obvious. If such proof were incompetent, a broker who had entered into negotiations with a person might make a memorandum of a contract wholly different from that which he was authorized to sign, and thereby effectually preclude all proof that no such contract was ever made. *Allen* v. *Pink*, 4 M. & W. 144. *Pitts* v. *Beckett*, 13 M. & W. 743, 750.

New trial granted.

Upon the second trial, *Bigelow*, C. J. refused to allow the defendant to prove, that when the alleged contract was made, there was, in the market and among sellers of copper, a general expectation of intelligence by the next steamer of a rise in the price of copper in Europe; and, upon evidence of facts substantially the same as appeared at the former trial, refused to instruct the jury, as requested by the defendant, "that if they found it was part of the agreement of December 9th that one hundred thousand pounds of copper might be added by the defendant on the next day, the memorandum was insufficient,

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by reason of its omission to include that part of the agreement;" but did instruct them, "that the broker must record, in all essential particulars, the exact contract he had authority to make; and that, if they were satisfied that he omitted any essential element of it, there was no valid contract; that the omission to state in the memorandum the defendant's right to add one hundred thousand pounds would not invalidate the contract, unless they should find that the sale of the two hundred thousand pounds depended upon the right to deliver the one hundred thousand additional on the next day; but that, if they should find that the right to deliver the one hundred thousand pounds was made a condition of the bargain, and was so far an element of it that none of it was to be binding unless this was, then the omission to insert it in the memorandum would be fatal to the action." The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, which were argued and decided in March 1862.

H. W. Paine, (*Peabody* with him,) for the defendant.

E. D. Sohier, (*Bangs* with him,) for the plaintiffs.

CHAPMAN, J.* The fact that at the time of making the contract there was a general expectation that the next steamer would bring news of a rise in the price of copper in Europe would not be pertinent to the case, if true; and the evidence was properly excluded. This is too plain to require discussion.

The question at issue at the trial was whether Canterbury, the broker, had authority to make such a memorandum as he did. It depended on oral testimony, and was therefore a question to be decided by the jury, under instructions from the court. Upon the bill of exceptions, the question is not whether the finding of the jury was against the evidence, or the weight of the evidence, for such a question can only be raised by motion for a new trial; but it is whether the jury were properly instructed. The court are of opinion that the instructions were correct. They embrace the substance of what the defendant asked, in case the jury should find the facts as supposed by him;

* HOAR, J. did not sit in this case.

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they state the law correctly, in case the jury should find the facts as contended for by the plaintiffs; and they properly leave it to the jury to find what the agreement actually was in respect to the point in controversy. It was a question for the jury, and not for the court. *Exceptions overruled.*

Oliver L. Sanborn & another *vs.* Fireman's Insurance Company.

A contract of insurance need not be in writing.

An insurance company authorized by their charter "in their name and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct," to make contracts of insurance, have authority to make an oral contract of insurance.

The agent of an insurance company, authorized by them "to effect fire insurance upon buildings, goods, wares and merchandise, and for this purpose to survey risks, fix the rate of premium, and issue policies of insurance signed by the president, attested by the secretary, and countersigned" by himself, has authority to make an oral contract of insurance.

An oral contract of insurance for one year including its date is a contract to be performed within a year, and therefore not within the statute of frauds.

In an action upon an oral contract of insurance, the plaintiff's agent testified that he prepared a general application, and left it at the office of the defendants' agent, and the clerk of the latter came to him and said that he would take two thirds of the risk and allow a certain commission; that the plaintiff's agent went to the defendant's agent, and the amount, rate and time of insurance were agreed upon between them; that the two agents had running accounts with each other and settled once a month; that the same afternoon the property was destroyed by fire, and the defendants' agent called upon the plaintiffs' agent and said he did not consider the risk completed. *Held*, that there was evidence for the jury of a contract of insurance, which began immediately.

In an action upon an oral contract of insurance, the defendants' book of entries of risks taken, in which the alleged contract is not entered, is inadmissible to prove there was no contract.

Action of contract on an agreement to insure the plaintiffs' stock of paper and hydraulic press in the Gerrish Market in Boston, against fire for the term of one year from and including the 12th of April 1856. At the trial before *Hoar*, J., the following facts were proved:

The defendants were an insurance company established under the laws of South Carolina. Their charter provided

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that "the said corporation in their said name, and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct, shall have a right to make contracts and underwrite policies of insurance and indemnity against fire" on buildings, vessels, goods, wares and merchandise, and other property, within or without that state.

Oliver Brewster was their agent in Boston, authorized by his power of attorney "to effect fire insurance upon buildings, goods, wares and merchandise," "and for this purpose to survey risks, fix the rate of premium, and issue policies of insurance, signed by the president, attested by the secretary of the said company, and countersigned by the said Oliver Brewster, and to assent to the transfer and assignment of the same, which policies, so issued and assigned, shall have full force and effect to bind said company."

The property was of greater value than the amount alleged to have been insured thereon, and was destroyed by fire about one o'clock in the afternoon of the 12th of April 1856. Then plaintiffs, after the fire and before suing, demanded payment of the loss, and also demanded policies, and offered to pay the premium.

William H. S. Jordan, called as a witness for the plaintiffs, testified as follows: "I am an insurance agent; I was employed by the plaintiffs some days before the 11th of April to effect insurance on their stock and hydraulic press in the Gerrish Market; on the 11th of April I went to Oliver Brewster and asked him if he was disposed to take a risk in the Gerrish Market; after some conversation as to rate and companies, he said he thought he could take it in the Farmers' and Mechanics', and in the Fireman's Insurance Companies; and if I would furnish an application and survey, he would see. I prepared a general application and survey for $6000 insurance, and left it at Brewster's office that afternoon, but Brewster had then gone. About twelve o'clock the following day, the 12th of April, Brewster's clerk came in and said Brewster would take two thirds

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of the risk, one third in each company, and would only allow me five per cent. commission. I replied that I would go and see Brewster, and did so immediately, at his office. Brewster and I agreed to alter the amount to one third of $1000 on the press, and one third of $5000 on the stock, in each company. There were no other companies spoken of as binding the risk; we may have spoken of other companies for the balance of the insurance that I wanted. Brewster offered to negotiate for the balance, but I told him I would fix that myself. Rate fixed on was one and a half per cent.; property, as described in application; time, one year. I caused an entry of the transaction to be made in my books. Brewster and I had accounts with each other, commenced in 1853; we settled once a month; we completed the policy, delivered it, and charged the premiums, and at end of the month settled, and usually paid the balance in cash."

On cross examination the witness testified: "Brewster would allow me only five per cent. commissions; it is very probable that we did talk the matter of commissions over; I urging my ten, he saying five per cent. was enough. I made an agreement for the insurance, which was completed; but about commissions I have no recollection. I went to get further insurance at other offices. I then returned to my office, and finding there would be fractions, I sent a paper by a boy to Brewster about the division of the risk — $333 on the press, and $1667 on the stock. I did not know then of the fire. Brewster came in immediately after the return of my boy, and said, 'I see that building is on fire;' I said, 'I heard it is;' he gave me to understand that he did not consider the risk completed on his part."

After the plaintiffs had introduced their testimony, the defendant requested the judge to instruct the jury as follows: "1st. That the contract of insurance is required to be in writing, and that a suit at law is not maintainable on an oral agreement. 2d. That the laws of South Carolina incorporating this company require that the insurance should be by a policy signed by the president, &c., and that a suit could not be maintained upon an oral agreement of Brewster to insure. 3d.

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That Brewster had no authority to bind the company in any other way than by a policy signed by the president, attested by the secretary, and countersigned by himself. 4th. That this being a contract not to be performed within a year, it was void by the statute of frauds. 5th. That there was not sufficient evidence of a complete bargain for the plaintiff to maintain his case." The presiding judge, for the purposes of the trial, ruled the first four points in favor of the plaintiffs, and ruled that there was evidence to go to the jury of a contract of insurance.

The defendants then called as a witness Oliver Brewster, who, after describing the interview with Jordan on the 11th of April substantially as Jordan had done, testified further as follows: "The next day I saw the application on my desk; I sent my clerk down to Jordan, to say that we could not allow him full commission; that it was an extra-hazardous risk. Jordan came up to the office soon after, about twelve o'clock, and we had some conversation. Jordan claimed the full commission of ten per cent., and I refused to allow that, on account of the character of the risk. I proposed dividing it among several companies, as it was not a good risk. The point in dispute between us was the amount of the commission. I said I would not allow it; he claimed the full commission. There was no agreement; nothing was said about my insuring this property, and leaving the commission open. The next thing I heard was, a boy came up from Jordan's office with a memorandum, I think half an hour after. I told the boy I would see Jordan; I went down immediately. On my way down I heard of the fire, and just put my head into Jordan's office, and told Jordan we had no insurance on the building."

Upon cross-examination Brewster said: "I had ten per cent. commission allowed me by the defendants. Jordan's commission would come from my commission, and not from the defendants. I went to Jordan's office, because the boy came up and said Jordan wanted insurance effected. The boy said that the memorandum which he brought contained the division Jordan wanted made of the risk. I went because I had not effected any insurance, and I wanted him to know he was not

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insured. The only advantage to the defendants of five per cent. commissions over ten per cent. commissions was in discouraging the offering of such risks, by not allowing full commissions. I was not a moment in Jordan's office; merely said I had no insurance for him on Gerrish Market. He said he hoped I would pay the loss. I had a monthly account with Jordan; generally settled premiums and commissions once a month."

The defendants further proved that Brewster always had blank policies of the company, signed by the president, and attested by the secretary, which he countersigned and issued, to insure parties applying.

The defendants also, to corroborate Brewster's testimony, and as evidence tending to show that there was no agreement for insurance completed, offered in evidence a book kept by him for them, in which he entered all risks taken by him for the company, as soon as taken. But, upon objection of the plaintiffs, the judge ruled that the book was inadmissible.

After the jury had retired, they came into court and inquired of the judge whether it was necessary for them to find that the commissions to be allowed Jordan by Brewster were agreed upon between Jordan and Brewster. The judge instructed them that they must determine whether the commissions of Jordan were a part of the contract for insurance; and that if they were satisfied that the commissions were no part of the bargain for insurance between Jordan and Brewster, but that they had agreed upon the insurance and the terms thereof, and left the commissions to be adjusted between themselves, they should find for the plaintiffs.

The jury found for the plaintiffs, the defendants alleged exceptions, and the judge reported the case to the full court.

C. W. Loring & J. Lathrop, for the defendants.

H. C. Hutchins, for the plaintiff.

Hoar, J.* 1. The first ground of objection to the verdict is, that a contract of insurance can only be made in writing. No principle of the common law seems to require that this contract,

* Hoar, J. sat through the rest of this term, and Dewey, J. did not sit again except as hereafter mentioned.

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any more than other simple contracts made by competent parties upon a sufficient consideration, should be evidenced by a writing. No statute of Massachusetts contains such a requirement. Upon principle, therefore, we can find no authority in courts to refuse to enforce an agreement which the parties have made, if sufficiently proved by oral testimony. On the contrary, there are decisions which recognize contracts of insurance resting in parol. *M'Culloch* v. *Eagle Ins. Co.* 1 Pick. 280. *Kennebec Co.* v. *Augusta Insurance & Banking Co.* 6 Gray, 204. *Commercial Mutual Marine Ins. Co.* v. *Union Mutual Ins. Co.* 19 How. 318; affirming *S. C.* 2 Curt. C. C. 524. *Hamilton* v. *Lycoming Mutual Ins. Co.* 5 Barr, 339. Some of the text writers, indeed, express a doubt whether valid insurance could be made, except in writing. Mr. Duer, in his treatise on insurance, remarks that "in this country there is no statute in any of the states, that requires that the contract of insurance shall be in writing; and upon the principles of the common law, an unwritten, or in technical language, a parol agreement, is doubtless sufficient; but as the usage of a written contract has long and universally prevailed, it has probably acquired the force of law, and it is doubtful whether an action upon a contract, merely oral, would now be sustained." 1 Duer Ins. 60. See also 1 Phil. Ins. § 8. In *Smith* v. *Odlin*, 4 Yeates, 468, Chief Justice Tilghman expressed a doubt whether a valid insurance could be made otherwise than in writing; and in *Cockerill* v. *Cincinnati Mutual Insurance Co.* 16 Ohio, 148, it was held that it could not.

But in 1 Parsons Marit. Law, 19, the opposite opinion is stated. In *Sanford* v. *Trust Fire Ins. Co.* 11 Paige, 556, Chancellor Walworth discusses the question without deciding it, the inclination of his opinion seeming to be in favor of the validity of the oral contract. And it was so held by the court of appeals in *Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.* 19 N. Y. 305. It is not easy to see the force of the reasoning which would infer, that, because parties usually make their contract in one way, it would be void when they choose to make it in another, equally good at common law, and not

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prohibited by any statute. In determining whether, in any case, a complete and perfect contract had been made, the circumstance that a contract in writing was contemplated, and had not been executed, would certainly be entitled to a great weight. *Real Estate Mutual Fire Ins. Co.* v. *Roessle*, 1 Gray, 336.

2. The next objection is, that the defendants had no authority to make the oral contract declared on, because they were by their charter authorized only to make contracts by the signature of their president or of such other person as their rules and by-laws should direct. The case chiefly relied on to support this position is that of *Head* v. *Providence Ins. Co.* 2 Cranch, 127. But while the principle which that case declares, that a corporation, being the mere creature of law, can have no powers but such as are derived from the act which creates it, is undoubtedly a sound one, the application of the principle has been very much modified in other cases. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326. *Bank of United States* v. *Dandridge*, 12 Wheat. 69. *New England Marine Ins. Co.* v. *De Wolf*, 8 Pick. 56. *Foster* v. *Essex Bank*, 17 Mass. 497. *Tayloe* v. *Merchants' Fire Ins. Co.* 9 How. 390. *Commercial Mutual Marine Ins. Co.* v. *Union Mutual Fire Ins. Co.* 19 How. 318. We cannot think that a provision in the charter of an insurance company, authorizing contracts authenticated by the signature of a particular officer, and without any words of restriction, should generally be construed to limit the powers of the company, and to prevent them from making contracts within the ordinary scope of their chartered powers. On the contrary, the phraseology of those statutes respecting the execution of policies should be regarded as consisting simply of enabling words, not restraining the power which they confer to make contracts, of which the policies are the evidence. 19 How. 321, before cited.

3. The objection that the agent had only power to issue policies, and not otherwise to make contracts binding on the defendants, comes within the same rule of construction. His

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power of attorney authorized him "to effect insurance," and "for this purpose to survey risks, fix the rate of premium, and issue policies of insurance, signed by the president," &c. We are of opinion that this gave him authority to make the preliminary contract, as well as to issue the policy. He was not a special agent, employed merely to receive and transmit proposals to his principal, but had power to do whatever the company could do in effecting insurance; and it appeared by the evidence of the defendants that he was furnished with policies signed in blank, to be filled up and issued at his discretion.

4. We are of opinion that the contract was to be performed within a year, and is therefore not included in the provisions of the fifth clause of the Rev. Sts. *c.* 74, § 1. When time is spoken of, any act is within the time named that does not extend beyond it.

5. We think there was evidence, competent for the consideration of the jury, that the risk was to commence at the time the contract was made.

6. No authority is cited in support of the proposition that the omission to make an entry of a contract in a book kept by one party is evidence, in favor of that party, that no contract was made. Such an entry constituted no part of the contract, and the plaintiff had no knowledge of the habit of the defendants' agent in that respect, and could not be affected by it. It was clearly inadmissible.

Judgment on the verdict for the plaintiff.

Harrison Fay *vs.* Alliance Insurance Company.

In the case of a partial loss of freight, one half of which is covered by a policy of insurance, and the value of which, mentioned in the policy, is less than the actual amount of the freight, the rule for the assessment of damages is the proportion of the valuation which the freight actually lost bears to the real value of the freight.

It seems, that the testimony of the assured to the statements of the president of an insurance company after the writing of the policy, as evidence of a usage tending to explain it, is not rendered incompetent, under the statutes of this commonwealth, by the death of the president.

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Fay v. Alliance Insurance Company.

It seems, that under a bill of lading, otherwise in the usual form, but having upon its face these clauses: "Goods to be received at the ship's tackles, when ready for delivery; freight payable before delivery, if required;" not merely safe arrival and notice thereof to the consignee, but reasonable time to enable him to receive his goods at the ship's tackles, is necessary to the earning of freight.

A policy of insurance upon freight on a voyage to a port of discharge in Australia terminates at the first port at which cargo is discharged.

A policy of insurance was made upon the freight of a ship on a voyage "from New York to port of discharge in Australia." The ship arrived at Geelong in the bay of Port Philip, there discharged part of her cargo, destined to Geelong, afterwards proceeded to Hobson's Bay, which is an anchorage ground for the port of Melbourne, also within the bay of Port Philip, but twenty five miles from Geelong, and to which the rest of the cargo was destined, and was there destroyed with part of her cargo by fire. Upon the trial of an action for this loss of freight, it was proved that Geelong and Melbourne were legally two distinct ports, each having a custom-house, and with a coasting trade between them, and were largely known commercially as distinct ports, that distinct contracts were commonly made in reference to them, and that Port Philip was not a port of entry. The assured contended that the whole bay of Port Philip was treated by commercial usage as a single port of discharge, including Geelong, Hobson's Bay and Melbourne, as merely separate landing-places within it; and introduced evidence that at the time of loading the vessel the president of the insurance company was informed that she was to carry freight to Geelong, and said that no change in the policy was necessary, because she was insured to a port in Australia, Port Philip was the port intended, and Geelong was one of the landing-places in Port Philip; and also evidence that when shipments were made designed for Geelong or Melbourne, Port Philip was used as a more general and comprehensive term, in the same way as Australia or a port in Australia was used, without indicating the particular port; that some policies of insurance had been made to Port Philip, and that charter parties and bills of lading had been made in which Port Philip was named as a port of destination. But it did not appear that uniformly or usually these contracts were made in reference to more than one of the ports within the bay; or that before the making of the policy in suit there had ever been a loss adjusted under a policy of insurance, in which the question arose whether Port Philip was commercially regarded as a single port, or any policy made upon which such a question arose afterwards. *Held*, that there was no evidence of such a distinct, well settled and uniform usage as would maintain the action.

ACTION OF CONTRACT on a policy of insurance for $12,500 upon the freight of ship Columbia, valued at $25,000, "at and from New York to port of discharge in Australia"; payable, in case of loss, in sixty days after proof and adjustment thereof.

At the trial before *Hoar*, J., it appeared that the ship arrived at Geelong in the bay of Port Philip, and there discharged the part of her cargo consigned to Geelong and received the freight thereon; a fortnight afterwards proceeded to Hobson's Bay with the rest of her cargo, which was consigned to that place, and there discharged part of it; that the cargo then remaining was lumber owned and consigned to Walter Arnold, a passenger

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on board, whose bill of lading, in other respects in the usual form, had upon its face the following clauses: "Goods to be received at the vessel's tackles, when ready for delivery; freight payable in specie or equivalent before delivery, if required;" and who, upon notice that his lumber was ready for delivery and demand by the master of the vessel, paid $6000 on account of the freight thereon, which amounted to $18,678; that three days afterwards, and before any of this lumber had been delivered, the ship and lumber were destroyed by fire; and that the whole freight list of the vessel amounted to $28,183.85, and the freight actually received to $8,283.41. The plaintiff testified that at the time of loading the vessel he went to the defendants' president, (since deceased,) told him there was freight going on board to be left at Geelong, and asked him if it was necessary that any change should be made in the policy; that he looked at the policy, and said that he did not see a necessity of any change, that the policy was to a port in Australia and no particular port was mentioned, that Port Philip was the port intended and Geelong was one of the landing-places in Port Philip. The substance of the rest of the evidence introduced at the trial is stated in the opinion.

The defendants made the following objections to the admission of the evidence: "1st. That the evidence offered to establish a construction of the policy by usage was inadmissible, because it tended not merely to vary or control an unambiguous contract, but to introduce terms completely repugnant to it, and so not within any rule of evidence as to usage. 2d. That the evidence of usage as to bills of lading and charter parties being contracts made *diverso intuitu* from policies, was inadmissible. 3d. That the testimony given by the plaintiff was not by law admissible, nor was he a competent witness."

The defendants also asked the court to instruct the jury "1st. That the evidence, thus admitted, if believed, will not entitle the plaintiff to recover. 2d. That, under the peculiar provisions of this bill of lading of Arnold's lumber, the delivery of the lumber was not a condition precedent to the earning of freight; but that the safe arrival at the port of discharge,

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and notice to the consignee, make the freight payable. 3d. That at least the $6000 of freight paid by Arnold, under the facts proved, could not be recovered back from the plaintiff, and was not a lost freight. 4th. That the whole freight list being $28,183.85, and the insurance on one half of it, valued in the policy at $25,000, and the freight actually received being $8283.41, the $8283.41 was to be deducted from the $25,000, and the defendants to pay half the balance."

But the judge admitted the evidence, and, for the purposes of the trial, declined to instruct the jury as requested; and instructed them "that the question for them to determine, in the first instance, was, whether the whole bay of Port Philip, with its several places of anchorage and discharge, constituted, by the general commercial usage and understanding at the time this policy was made and the voyage performed, a single port of discharge in Australia; that the meaning of the words, 'port of discharge in Australia,' used in the policy, might be ascertained by admitting parol evidence to show what meaning and extent, in the general understanding of the mercantile world, is attached to this word 'port,' as applied to the place where, by the policy, the risk is made to end; that, although this mercantile sense attached to this term may give the port in question a greater or less extent than its legal or political limits, yet the mercantile sense and not the legal import of the word must prevail; that the conversation with the president of the defendants was not admissible as evidence to control or explain the contract created by the policy, but was only evidence on the point whether Port Philip was, by general commercial usage and understanding, a single port of discharge in Australia, and that it should have no other or further effect in relation to this particular policy; that, under the provisions of the bills of lading in this case, safe arrival and reasonable notice to the consignee, giving him time sufficient to receive the cargo at the end of the ship's tackles, were necessary to the earning of the freight thereon; and mere safe arrival and notice thereof to the consignee did not enable the ship owner to recover his freight, or put the property, so far as the freight thereon was concerned, at the risk of the shipper,

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if no such opportunity to receive the cargo was afterward afforded; that to the extent to which the cargo might have been received after reasonable notice to the consignee, as before stated, the freight was payable by him, and should be deducted from the amount of loss claimed; that, for the purposes of the trial, they would, if they found for the plaintiff, deduct from the whole freight, $28,183.85, the freight earned, $8283.41, and deliver their verdict for one half the balance, with interest from sixty days after they should find that preliminary proof had been offered by the plaintiff to the office, or find any waiver thereof by the defendants; making however such allowance, if any, before casting interest for freight of goods not received by the consignee, after reasonable notice, upon the principles before stated, as they should find proper under the evidence."

The jury returned a verdict for the plaintiff, and the judge reported the case for the decision of the full court.

D. Thaxter & R. Choate, (*S. Bartlett* with them,) for the defendants.

B. R. Curtis & G. S. Hillard, for the plaintiff.

Hoar, J. The rule for the assessment of damages, which was adopted for the purposes of the trial, was erroneous. This was a case of partial loss, and the underwriters were responsible only for the proportion of the amount of the entire valuation of freight in the policy, which the freight actually lost by the peril insured against bore to the actual value of the entire freight. 1 Arnould Ins. 305. *Forbes* v. *Aspinall*, 13 East, 327. *Wolcott* v. *Eagle Ins. Co.* 4 Pick. 436. The rule adopted at the trial would deprive the defendants of the whole benefit of the valuation in the policy, as applicable to the freight lost; while the rule for which the defendants contended would deprive the plaintiff of the benefit of the value of the freight which was earned, above its proportionate valuation in the policy. The latter would operate very injuriously to the underwriters in a case in which there should be an overvaluation of freight and the partial loss should be a very small one. The more equitable course for both parties is to treat the valuation as applicable to any part lost, in like proportion as it would be to the true value of the whole.

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The other instructions which were given at the trial seem to the court to have been substantially correct;* but we have not given to them all the full and particular consideration which their importance and the novelty of some of them might demand if the decision of the case depended upon the disposition made of them; because we are all of opinion that the defendants were entitled to one ruling which was refused, and that for this reason the verdict must be set aside and a new trial granted.

The insurance was upon the freight of the ship Columbia on a voyage from New York to a port of discharge in Australia. The ship arrived at Geelong in the bay of Port Philip, and there discharged a part of her cargo. About two weeks after she proceeded from Geelong to Hobson's Bay, which is an anchorage ground for the port of Melbourne, twenty five miles from Geelong; and there the vessel and a part of the cargo were burned. If Geelong was a port of discharge, and going to Hobson's Bay was leaving that port and going to another, the risk had terminated before the loss occurred. The insurance being to a single port of discharge, the first port at which bulk was broken was the terminus of the voyage insured. *Coolidge* v. *Gray*, 8 Mass. 527. *King* v. *Middletown Ins. Co.* 1 Conn. 184. *Lapham* v. *Atlas Ins. Co.* 24 Pick. 1.

But the plaintiff contended that the whole bay of Port Philip, with its several places of anchorage and discharge, constituted, by the general commercial usage and understanding, at the time this policy was made and the voyage performed, a single port of discharge in Australia; and were allowed to offer evidence in support of this proposition. The defendants then asked the court to instruct the jury, "that this evidence, if believed, will not entitle the plaintiff to recover."

* In the argument were cited, upon the question of the competency of the plaintiff as a witness, *Sts.* 1856, *c.* 188; 1857, *c.* 305; 1859, *c.* 230, § 2; *Almgren* v. *Dutilh*, 1 Seld. 28; and upon that of the construction and effect of the bills of lading, *Brittan* v. *Barnaby*, 21 How. 527; *Griggs* v. *Austin*, 3 Pick. 20; *Strong* v. *Natally*, 1 New Rep. 16; Abbott on Shipping, (7th ed.) 406–409; 1 Parsons Marit. Law, 222.

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We think this instruction should have been given. There was, it is true, some evidence on the part of the plaintiff, and the weight of evidence is for the jury to determine. But if all the evidence offered, with all the inferences which can be drawn from it, is not legally sufficient to establish the fact in issue, it is not to be left to the jury to find the fact. Evidence may be competent, as tending to establish a fact, and yet be wholly insufficient, for the want of other evidence essential to its completeness. *Parks* v. *Ross*, 11 How. 362.

It was proved that Geelong and Melbourne were legally two distinct ports, each having a custom-house, and with a coasting trade between them; and a part of the cargo was destined for Geelong, and the remainder for Melbourne. They were twenty five miles apart, in the bay of Port Philip, which is thirty miles deep by forty wide; and the bay is not itself a port of entry. The usage which the plaintiff undertook to establish was a usage to treat the bay of Port Philip for all commercial purposes as a single port of discharge, including Geelong, Hobson's Bay and Melbourne as merely separate landing-places within it. To give such a usage any legal effect in the construction of the contract between these parties, it must appear to have been uniform, settled and well understood at the time the contract was made, in November 1853.

On examining carefully the evidence offered, it does not appear, in the first place, that prior to November 1853 there had ever been a loss adjusted under a policy of insurance, in which the question arose whether Port Philip was commercially regarded as a single port in Australia; or that any policy was then made upon which such a question afterward arose. It appears that some policies were made to Port Philip, and that charter parties and bills of lading were made in which Port Philip was named as the place of destination; but it does not appear that uniformly, or usually, and perhaps not in a single instance, these contracts were made in reference to shipments to more than one of the ports within the bay. The usage was certainly not uniform, because a large proportion of the instruments named Melbourne, and some of them Geelong, specifi-

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cally, as the port of destination. John S. Tyler, the witness whose testimony was perhaps the strongest for the plaintiff, speaks of the naming Port Philip, when shipments were designed for Melbourne or Geelong, as arising from ignorance of the geography of the country, and from a want of accurate information as to the particular landing-places for goods destined to one place or the other. He says that Port Philip was used as a more general and comprehensive term, in the same way that Australia or a port in Australia was used, without indicating the particular port. But it would hardly be argued that under a policy to Australia, or to a port in Australia, there would be included a right to go to successive ports, at any distance from each other, in that country. The custom which he indicates would seem to be only a custom to insure to Port Philip, and under that insurance to go to either of the ports or landing-places included within that description; giving a similar extent of choice as in the case of an insurance to Australia, but not including more than one. The testimony of the plaintiff as to the statement made by the president of the defendants' company, which would not in itself be sufficient to establish a usage, does not show that he knew that goods were to be shipped for more than a single port of discharge.

A case somewhat resembling this is the case of *Vos* v. *Robinson*, 9 Johns. 192. There a vessel was insured "at and from Port Plata, St. Domingo, to New York;" and in going from Port Plata to Susua, which is in the district bearing the name of Port Plata, and about eighteen miles east of the port, in order to take in a cargo, she was driven into the bay of Isabella, in the same district, and there lost. She had a permit from the custom-house at Port Plata to go to Susua to obtain her cargo, and would have been obliged to return to Port Plata to pay the duties and get a clearance, such being the usual course of trade there. The custom-house and port of entry were confined to the particular place called Port Plata, and the district, for the purposes of revenue, which bears that name, extended nearly a hundred miles along the coast of St. Domingo. Port Plata is a safe harbor, but Susua and Isabella are open roads,

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and dangerous when particular winds prevail. It was held that Port Plata proper and the district of Port Plata were different objects and the perils distinct; that the going from Port Plata to Susua was a deviation; and that nothing but a clear, well settled and well understood usage of trade, which the evidence did not show, would be sufficient to include both objects under the simple name of Port Plata.

We think that the evidence in the case at bar fell far short of showing that Port Philip was by a distinct, well settled and uniform commercial usage regarded as a single port of discharge, in which Melbourne and Hobson's Bay and Geelong were merely landing-places. On the contrary, it showed that while ignorance of the particular ports often led to the use of Port Philip in commercial instruments as a general term to include whatever port within it might be the port of destination, Melbourne and Geelong were to a large extent known commercially, as they were legally, as distinct ports, and that distinct contracts were very commonly made in reference to them.

New trial granted.

William Parsons & another *vs.* Manufacturers' Insurance Company.

It is not a deviation for a vessel insured "at and from Callao to the Chincha Islands and from thence to New York," to return, after loading at the Chincha Islands with guano, to Callao for a clearance, if such is the usage of trade, and no clearance can be obtained at the Chincha Islands.

Upon the issue of the seaworthiness of a vessel at a certain time, the question whether a vessel would be seaworthy with pumps in the condition in which hers were found to be on the completion of her voyage some months afterwards is immaterial.

A paper stating the repairs made on a vessel, and her condition at the time of the repairs, signed but not written by a shipbuilder's foreman, who testifies that from seeing his signature to it he believes and has no doubt that the facts were as there stated, but that he has no recollection of the facts or of having signed it, is not competent evidence of the facts stated therein.

At the trial of an action on a policy of insurance on a vessel, the master of the vessel may be asked what caused the vessel to leak, whether as a matter of opinion or of fact.

Where a vessel is not so injured as to be incapable of performing her voyage, and the cargo remains capable of delivery *in specie* at the port of destination, there is no loss of freight for which insurers on freight are liable, except in case of general average; but where the

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cargo is so injured by perils of the sea as to become wholly worthless and incapable of being carried with safety to the vessel and the remaining cargo, and is therefore thrown overboard, there is a total loss of freight on that part.

A vessel laden with guano at the Chincha Islands, having stopped at Callao for a clearance, and then started on her homeward voyage, sprung a leak and put back to Callao in distress, when it was found that a part of the guano had been so damaged by sea water that it was utterly worthless and could not be kept on board with safety to the vessel, and, if it could have been landed, the cost of drying it would have been greater than its value when dried, and it was thrown overboard. The rest of the cargo was necessarily discharged in order to repair the vessel, a freight paid thereon, and it was transshipped by its owner into another vessel bound for a different port; and the first vessel, after being repaired, and by permission of the charterers, went back to the islands, and took in another cargo of guano under the original charter, which she delivered in safety at her port of destination. *Held*, that there was a total loss of freight of the guano thrown overboard, but no loss of freight on that transshipped. *Held, further*, that evidence that the course thus taken was the usual and prudent course for vessels in such a situation, and the testimony of an insurance broker that in adjustment of losses under these circumstances the usage had been to treat the voyage as one and the same, and the substituted cargo as if it were the original cargo landed and reshipped, and that before the date of the policy on the freight of this vessel he had adjusted losses in one case, and, he thought, in others, accordingly, were insufficient to prove a custom which could affect the rights of the parties; and that the going back to the islands, and taking in a cargo after the repairs of the vessel, must be treated as a new voyage and not as a resumption of the old one.

ACTION OF CONTRACT on a policy of insurance, dated December 13th 1854, for "$7500 on barque Arctic, and $7500 on freight of said vessel, at and from Callao to Chincha Islands, and at and from thence to New York, with liberty to stop at a port north of Cape Henry for advice, the assured paying a fair additional premium if such port is used."

After trial before *Hoar*, J., and verdict for the plaintiffs, the case was reserved for the consideration of the full court, and is stated in the opinion.

C. B. Goodrich, for the defendants.

B. R. Curtis & S. L. Thorndike, for the plaintiffs.

HOAR, J.* The voyage insured being "from Callao to the Chincha Islands, and from thence to New York," the vessel sailed from Callao to the Chincha Islands, and having there loaded with a cargo of guano, returned to Callao for a clearance; sailed from Callao for New York; and having afterward on the voyage encountered the peril against which she was in-

* BIGELOW, C. J. did not sit in this case.

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sured, the question is, whether her going to Callao from the islands was a deviation which discharged the underwriters.

Mr. Arnould states the rule thus: "Where, by the usage of trade, it is customary, in the course of the voyage insured, to stop at interjacent ports, though lying out of the direct line from one terminus to the other, it will be no deviation to stop there, though no leave for that purpose be reserved by any express clause, because the stopping at such port is, in these cases, considered to be a regular part of the voyage insured, and as such to have been foreseen and contemplated by the parties to the policy." 1 Arnould Ins. 354. "The meaning of the contract of insurance for the voyage," says Chancellor Kent, "is that the voyage shall be performed with all safe, convenient and practicable expedition, and in the regular and customary track." 3 Kent Com. (6th ed.) 312. That underwriters are bound by a fixed usage of trade, and that to pursue the voyage insured in conformity with such usage is not a deviation, is established by numerous decisions. *Lowry* v. *Russell*, 8 Pick. 360. *Martin* v. *Delaware Ins. Co.* 2 Wash. C. C. 254. *Vos* v. *Robinson*, 9 Johns. 192. *Cormack* v. *Gladstone*, 11 East, 347. *Noble* v. *Kennoway*, 2 Doug. 510. *Salvador* v. *Hopkins*, 3 Bur. 1707. *Bond* v. *Gonsales*, 2 Salk. 445. *Pelly* v. *Royal Exchange Assurance Co.* 1 Bur. 348. *Kingston* v. *Knibbs*, 1 Campb. 508 note.

The Chincha Islands are a dependency of Peru, and the taking of cargoes of guano from them is a government monopoly. They are not a port of entry or clearance, and cargoes can only be taken by a permit to be procured at Callao, and a clearance can only be obtained at that port. It was therefore, in our judgment, clearly competent for the jury to find, upon the evidence submitted to them, that a voyage from Callao to New York included, by the usage of trade, the right to return to Callao for a clearance, and that there was no deviation. The evidence, in effect, had a tendency to show that the only legal and customary route from the Chincha Islands to New York was through the port of Callao.

We are of opinion that neither of the objections made by the

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defendants to the admission or exclusion of evidence at the trial can be supported.

The question whether the vessel would be seaworthy, with pumps in the condition in which they were found after the completion of the voyage to New York, was objectionable, because it related to a state of facts too remote from that which was the principal subject of inquiry.

The rejection of a part of the testimony of Charles Green presents a question not so free from difficulty, but which, on careful consideration, we think was rightly decided. It appears by his deposition that he was the foreman of the shipbuilders who repaired the Arctic in New York, and had charge of the repairs. A paper, bearing date December 14th 1855, was shown to him, and annexed to the deposition. This paper, which is signed by the witness, but was not written by him, recites that the repairs on the barque were completed about the 10th of November 1855, and states the condition of the rudder case at the time the repairs were made. The witness deposes that he has no recollection of the condition of the rudder case, and no recollection of signing the paper, but that, from seeing his signature to it, he believes and has no doubt that the facts were as they are there stated. It appears therefore that his memory is not refreshed by looking at the paper. Nor does he remember that when he signed the paper he then remembered the facts which it recites, and knew them to be true. Nor is it a memorandum, made by himself in the ordinary course of business, which he knows was truly made, from any habit or rule to which he can testify — differing in that respect from the recent case of *Perkins* v. *Augusta Insurance & Banking Co.* 10 Gray, 312. We think therefore that he has really testified to nothing more than his inference from seeing his signature to the paper, and that this is not sufficient. The paper itself purports to have been made several weeks after the transactions to which it refers. It does not appear by whom it was made, nor whether the witness signed it upon the strength of his own recollections, or from his confidence in the veracity or accuracy of the person who prepared it. All that he says may be true, and yet he may

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never have had any personal knowledge of the particular facts concerning which he is asked to testify.

The question to the master, "What caused the vessel to leak?" if it involved a matter of opinion, was yet proper, because his nautical experience made his opinion on such a subject competent evidence. But the answer would rather imply that it was understood and answered as a question of fact, whether the water came in at the bows or the stern.

The principal remaining question, though novel to some extent in the particular application of the doctrines by which it must be determined, seems to us to be conclusively settled by decided cases. The material facts upon which it arises are these. The Arctic, having sailed from Callao to the Chincha Islands, and there received her cargo of guano, after returning to Callao for a clearance, sailed for New York on the 13th of January. She sprung a leak, which compelled her to return to Callao as a port of necessity, and was there repaired. Two hundred and eighty six and a quarter tons of guano had been so much damaged by the sea water, as to be in a semi-liquid state and utterly worthless, and could not be kept in the vessel consistently with its safety on the voyage. There was evidence tending to prove that the guano could not be landed at Callao; and if it could have been, that the cost of drying it would have been greater than its value when dried. It was thrown overboard. It was necessary to discharge the rest of the cargo in order to repair the vessel. By direction of the charterers of the vessel, who were the owners of the cargo, instead of being stored and reloaded, it was transshipped into another vessel bound for England. The Arctic received fifty cents a ton for freight on the part which was thus transshipped, and permission from the charterers to go to the islands after she was repaired, and take in another cargo of guano, under the original charter; which the evidence showed was the usual and prudent course for vessels in such a situation. She took a full cargo, in pursuance of this agreement, and delivered it safely in New York. A witness for the defendants testified that he had been many years an insurance broker, and in the

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habit of adjusting losses; that in an adjustment of losses, where a guano cargo had been transshipped at Callao, the usage had been to treat the voyage as one and the same, and a substituted cargo as if it were the original cargo landed and reshipped. On cross examination, he testified that he had adjusted losses in such cases prior to December 1854, either in general average for jettison or as partial loss. He mentioned one case which he thought occurred before that date, and thought there were several other cases, but could not name them.

Upon these facts, we are of opinion that the plaintiffs are entitled to recover the freight of the guano which was thrown overboard, as upon a partial loss, and that they are not entitled to recover for a total loss. The principles and rules which lead to this result have been thoroughly discussed and fully stated in the cases of *Roux* v. *Salvador*, 3 Bing. N. C. 266, *Jordan* v. *Warren Ins. Co.* 1 Story R. 342; *Clark* v. *Massachusetts Fire & Marine Ins. Co.* 2 Pick. 104; *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 595; *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405; and *Lord* v. *Neptune Ins. Co.* 10 Gray, 109. The whole subject has been so elaborately reviewed and considered, especially by this court in the last two cases cited, that it will be sufficient to state very briefly the reasons of our decision.

An insurance on freight is a contract to indemnify the assured, if he should be prevented, by any of the perils insured against, from delivering the cargo and earning his freight. If the vessel, by reason of such peril, is wholly lost, or if the cargo is destroyed, in either case there is a total loss of freight. But if the vessel is not so injured as to be incapable of performing the voyage, and the cargo remains capable of delivery *in specie* at the port of destination, there is no loss of freight for which the insurers are liable, except in cases of general average.

The barque Arctic was not totally lost. She returned safely to the port of Callao, was there made seaworthy without any very extensive or costly repairs, went to the islands again for a new cargo, and delivered it safely in New York. Nor was there a total loss of the cargo. Except the part which was thrown overboard, it remained in its original condition, capable of being

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discharged, stored, reshipped, and delivered *in specie* at the port of her original destination. The insurance on freight had attached to the voyage upon which the barque had entered, and the cargo which she had on board, at the time when she encountered the peril which caused her return to Callao. It was not on account of any peril insured against that she did not resume her voyage, with all the remainder of her cargo, after she was repaired; but in consequence of a voluntary agreement made with the charterers, wholly distinct from the contract, and independent of the interests, of the insurers on freight. As against those insurers, she had no right, after she was repaired, to do anything but to proceed on her voyage to New York. The fact that Callao, which was her port of necessity, was also her port of original departure on the voyage insured, would not alter the case. Although we have decided that a voyage from the Chincha Islands includes the right to touch at Callao for a clearance, such being the law and the usage, yet manifestly a voyage from Callao to New York does not include the passage to the Chinchas. If the voyage insured had been from Norfolk to Callao and the Chincha Islands, and thence to New York, it could not be supposed, if the vessel, when on her way to New York, should be compelled to put into Norfolk as a port of necessity, that this would be such a return to the point of starting as would authorize the repetition of the entire voyage. Yet the difference between the two cases would be a difference of distance only.

On the other hand, there was a total loss of freight upon that part of the cargo which was thrown overboard. The jury have found that it was worthless. While it is somewhat difficult to apply the rule so steadily adhered to by the courts of England and America — that the cargo must be destroyed *in specie* in order to cause a total loss of freight, and that mere diminution of value is not sufficient — to the case of such an article as guano, which is to be used for a manure only, yet when, as in this instance, the article, which is an article of commerce in a dry state, usually sold and transported in bags, has become reduced by the action of the salt water to a mere porridge, to be

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removed only in vessels which will hold liquids, unsafe to carry because it would clog the pumps and render the vessel unseaworthy, which the authorities of the country would not permit to be landed, and is wholly without value, we think no violence is done to the rule by deciding that it is a case of total loss. *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474. The jettison, although in one sense voluntary, would not make it the subject of general average, because it had no contributory value. There is no obligation to pay for a worthless thing, because it is also pernicious.

The evidence offered by the defendants to show that, by usage, the going to the islands for a new cargo was considered as a continued prosecution of the original enterprise, and the new cargo a substitution for the cargo first taken, we think insufficient to affect the rights of the parties. It was a new voyage, and not the resumption of the old one at the point where it was interrupted. A compensation in the nature of a *pro rata* freight was in fact received for the part of the voyage which was performed. Whether a custom so peculiar, and applicable only to a particular kind of cargo at a single port, could be supported, and allowed to control the operation of a contract of insurance, is extremely questionable. But upon examination of the testimony, we find it entirely inadequate to show that, at the time the policy was made, there was a usage so well settled, and of so long continuance, that any presumption could arise that the parties contracted in reference to it. *Eager* v. *Atlas Ins. Co.* 14 Pick. 141.

The verdict for the plaintiffs is therefore to stand, and the case, according to the agreement of the parties, is to be sent to an assessor to determine the amount of the loss on the vessel, and of the contribution in general average to which the defendants are liable, if any; and to assess a partial loss on freight upon the guano which was thrown overboard as worthless, according to the finding of the jury.

Judgment for the plaintiff accordingly.

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Prince S. Crowell *vs.* Frederick Barreda & others.

Under a charter party which provides that "twelve running days for each one hundred register tons be allowed to the charterers for loading the ship; nevertheless in no case shall the charterers have less than thirty nor more than eighty running days in all, Sundays and holidays excepted;" Sundays and holidays are to be included in computing the "twelve running days."

Action of contract by the owner against the charterers of the ship Hippogriffe, for demurrage under a charter party made according to a printed form in general use by the defendants, (who were merchants largely engaged in the guano trade,) for a voyage to the Chincha Islands for guano and back to the United States, at a certain rate of freight by the ton of cargo, and containing the following clause:

"Twelve running days for each one hundred register tons to be allowed to the charterers for loading the ship at the islands; nevertheless in no case shall the charterers have less than thirty or more than eighty days in all, Sundays and holidays excepted; said days to commence from the day when the master gives notice in writing of his being ready to receive and take on board, and to cease when the charterer's agents give notice that she is to receive no more cargo; and ten days to be allowed to the owners at port of clearance for taking in light freight and specie; with all the days of demurrage, over and above those specified, to be paid for at the rate of sixty five dollars per day from the party delinquent to the party observant."

The vessel was of six hundred and seventy one tons register. The parties admitted that the odd tons were to be counted, entitling her to have eighty days for loading under the charter; and submitted to the court upon these facts the question whether in calculating these eighty days Sundays and other holidays were to be included; with an agreement that if they were, judgment should be entered for the plaintiff for the amount of eighteen days' demurrage remaining unpaid; otherwise, judgment for the defendants.

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R. H. Dana, Jr., for the plaintiff.

G. M. Browne, for the defendants, cited Abbott on Shipping, (7th ed.) 304; *Brown* v. *Johnson*, 10 M. & W. 331; *Field* v. *Chase*, Hill & Denio, 50; *Duff* v. *Lawrence*, 3 Johns. Cas. 162; *Douglas* v. *Moody*, 9 Mass. 548; *Leidemann* v. *Schultz*, 14 C. B. 38; *Meyer* v. *Hunter*, 2 Car. & P. 601; *Dobson* v. *Droop*, 4 Car. & P. 112.

Hoar, J. It would not be difficult to give either of the two constructions suggested at the argument to this charter party, if there were anything in the circumstances to which the contract applies to indicate the intentions of the parties. But in the absence of any such evidence of intention, we must simply give a construction to the language used in the instrument.

It first provides that "twelve running days for each one hundred register tons are to be allowed to the charterers for loading the ship at the islands." The meaning of this is plain, the phrase "running days" having a settled commercial meaning of "successive" or "consecutive" days, without regard to the question whether they were days on which work could be done or not. It is an affirmative provision, complete and unqualified. If any qualification were intended, so that certain days which would ordinarily be comprehended in the phrase "running days" were to be excluded, it would seem natural to introduce it in the same connection, and to say, "twelve running days, except Sundays and holidays." But no such qualification is made; that branch of the sentence ends, and a proviso or limitation of the preceding proposition follows — "nevertheless in no case shall the charterers have less than thirty nor more than eighty running days in all, Sundays and holidays excepted; said days to commence" &c. This proviso seems to us to be predicated upon a complete description of the cases which it professes to limit. The charterers are in no case under the rule already stated, that they are to have twelve running days for each one hundred tons of the vessel's register, to have less than thirty running days, exclusive of Sundays and holidays. If the vessel were of only two hundred tons register, this would give the charterers six days more than the gen-

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eral allowance, beside the Sundays and holidays which might occur before its time expired. On the other hand, if the vessel were of twelve hundred tons, it should not be allowed more than eighty days beside Sundays and holidays, although this might give it much less than the one hundred and forty four running days which the general rule would allow. There is nothing in the ordinary rules of grammatical construction, which would extend the qualification found in the proviso to the first clause of the sentence.

The objection is urged by the defendant, that this construction does not give force to all the language used; and that if running days were meant in the first clause, and working days in the second, those words would have been used. But the answer is suggested in another part of his argument, namely, that there may be some days, beside Sundays and holidays, which are not working days; days on which, from the state of the weather, or from some obstacle in getting to the place of loading, or for some other cause, no cargo could be taken on board. The risk of these the charterers undertake to assume. They also take the chance of holidays, if they can have at least thirty days clear of them.

The probability seems to be, that to the greater part of the vessels engaged in the trade, for which this printed form of charter party was prepared, the simple rule of so many "running days," in proportion to their tonnage, would be applicable. This would make a computation of holidays necessary only in the extreme cases, which the proviso was intended to meet, and this, we think, is the fair interpretation of the contract.

Judgment for the plaintiff.

PRESIDENT, DIRECTORS AND COMPANY OF THE GROCERS' BANK *vs.* PLINY E. KINGMAN & others.

A cashier's bond voluntarily executed, and containing nothing contrary to law, is not invalid, because the condition varies from the form required by the Rev. Sts. c. 36, § 27.

The sureties on a cashier's bond are not entitled to notice of the cashier's resignation, or of his default, nor need any demand be made upon them, before action brought on the bond.

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Grocers' Bank v. Kingman & others.

Under the *St.* of 1852, c. 312, § 8, sureties on a bond, severally but not jointly liable, may be joined as defendants in one action on the bond.

The sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his fraud, inattention or negligence in the performance of his duties, are exonerated, by an increase of the capital stock of the bank after the making of the bond, from liability for acts of the cashier after the additional capital has been paid in.

The conveyance by a cashier to the bank of his property to cover certain known defalcations of his does not entitle the sureties on his bond to have that property applied in discharge of their liability for an embezzlement which was not known to the bank at the time of the conveyance.

ACTION OF CONTRACT upon the bond given by Kingman, as cashier of the plaintiffs' bank, as principal, and the other defendants in various sums as sureties. Trial before *Hoar*, J., who reported the case for the consideration of the full court. The facts are stated in the opinion.

H. F. Durant & H. Jewell, for the plaintiffs.

C. B. Goodrich & A. H. Fiske, for the defendants.

METCALF, J. It is objected to the maintenance of any action in this case, that the bond in suit is invalid, because it varies in the condition thereof from the form required by the Rev. Sts. *c.* 36, § 27. But as the bond was voluntarily executed, and nothing in the condition thereof is contrary to law, it must be held to be valid. Cases cited in *Sweetser* v. *Hay*, 2 Gray, 49. *Franklin Bank* v. *Cooper*, 36 Maine, 179.

It was also originally objected to the maintenance of this action against the sureties of the cashier, that no notice of his resignation or default was given to them, nor any demand made upon them, before action brought. But at the argument the defendants' counsel admitted that these objections could not be sustained, and they were properly withdrawn.

It is further objected that this action is not rightly brought against the defendants jointly, because by the terms of the bond in suit their obligations are several and not joint. We are of opinion that this objection cannot prevail. The third section of the practice act (*St.* 1852, *c.* 312) provides that "persons severally liable upon contracts in writing may all or any of them be joined in the same action." It is argued however by the defendants' counsel, that this provision is applicable to

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those cases only in which all the several contractors are liable to the whole extent of the contract, so that the same judgment can be rendered against all of them. We do not think so, for by the same section "the court shall take such orders for the separate trial of the issues, if any, as shall be found most convenient, and shall enter several judgments according to the several contracts of the defendants, and issue one or more executions thereon as the case may require." In *Fuller* v. *Morse*, 4 Gray, 295, it was said by the court that the sole purpose of this section was to facilitate proceedings against parties severally liable on the same contract, and permit their rights to be determined under one process, instead of compelling a party seeking redress to resort to several actions.

The statute which continued the plaintiffs a banking company beyond the time (October 1st 1851) limited in their original charter was passed on the 2d of May 1849, and the bond in suit was made on the 20th of June 1850. The decisions, therefore, which were cited by the defendants' counsel, (*Union Bank* v. *Ridgely*, 1 Har. & Gill, 433, and *Thompson* v. *Young*, 2 Ohio, 334,) that a cashier's bond given to a bank whose duration is limited to a certain time does not render the obligors liable for the misconduct of the cashier after that time, are not applicable to the present case.

Another ground of defence taken by the sureties on the bond in suit is, that by the increase of the capital of the bank, after the making of the bond, they were thenceforth exonerated from liability for the misconduct of the cashier. And we are of opinion that they were thereby exonerated from liability for any breach by the cashier of the condition of the bond subsequently to the increase of the capital.

It is an established rule of law that a party to a contract like that of these defendants shall not be bound beyond the extent of the engagement which appears from the terms of the contract and the nature of the transaction to have been in his contemplation at the time of entering into it, and that his liability cannot, without his consent, be extended or enlarged either by the obligee or by operation of law. Fell on Guaranties, 91.

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1 Parsons on Con. book 3, *c.* 8, § 5. *Miller* v. *Stewart*, 9 Wheat. 702 *& seq.* *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 234. Thus, a bond given as security for a collector of customs was held not to extend to a new duty laid on certain articles after the bond was given; and it was decided that the collector's sureties were not liable for his default in not paying the duties received by him on those articles. *Bartlett* v. *Attorney General*, Parker, 277, and *Bowdage* v. *Attorney General*, Parker, 278. So where one executed a bond as surety of an agent of a corporation, conditioned that he should duly account for all moneys received by him for the corporation, and the condition recited that the agent was appointed for the purpose of selling coal at a yearly salary of £ 100, and the corporation and agent afterwards agreed to substitute for such salary a commission of sixpence per ton on all coal for which he should obtain orders, it was decided that the surety was not liable for the default of the agent after the change of his remuneration. *Northwestern Railway Co.* v. *Whinray*, 10 Exch. 77. In that case, Baron Alderson said: "A person may be willing to be surety for another if the latter has a fixed salary, but not if the salary is fluctuating." "When the mode of remuneration was altered, the agency was different, and the risk of the sureties was materially increased." pp. 81, 82. According to another report of that case, Baron Platt said: "The change imposed on the surety a risk which he never undertook to bear. The surety's bargain was, that the clerk should have the salary, the more certainly to be able to resist temptation." 32 L. J. (Exch.) 264; 26 Eng. Law & Eq. 493. See also *Bamford* v. *Iles*, 3 Exch. 380, and *Bonar* v. *Macdonald*, 3 H. L. Cas. 226.

In the case at bar, the capital of the Grocers' Bank, when the bond in suit was executed, was $ 300,000. It was afterwards increased, first to $ 500,000, and then to $ 750,000. The risk of the sureties was thereby very greatly enhanced, especially as they undertook to save the bank harmless from every loss that might arise from the cashier's mistakes, as well as loss arising from his fraud, inattention or negligence in the perform-

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ance of his duties. Our judgment therefore is, that the sureties ceased to be liable on their bond for any misconduct or mistake of the cashier committed by him after any part of the increased capital was paid into the bank. And we are brought to this conclusion, notwithstanding a decision to the contrary by the superior court of Delaware, in the case *Bank of Wilmington & Brandywine* v. *Wollaston*, 3 Harringt. 90. In that case, however, the surety did not undertake to be answerable for losses caused by the cashier's mistakes. One effect of this decision is, that the sureties are not liable for any of the sums embezzled by the cashier, except the sum of $4,000; all the other sums having been embezzled by him after the proper certificate of the actual payment of additional capital (as required by *St.* 1853, *c.* 211, § 4) had been returned into the office of the secretary of the Commonwealth. Another effect of the decision is, to render immaterial the question whether the statements and admissions of the cashier were competent evidence against his sureties of the embezzlements for which they are not answerable.

For the $4,000 embezzled on the 5th of May 1853, before the paying in of any new capital, the sureties are liable — their bond being then in force, and the embezzlement being fully proved by other evidence than the cashier's statements and admissions — unless they are relieved from that liability by his conveyance to the bank of property exceeding $20,000 in value. It is argued for the sureties that this property should be first applied to the payment of the $4,000; the embezzlement of that sum being the first breach of the condition of the bond. But inasmuch as that embezzlement was not known to the bank when that conveyance was made, and the purpose of the conveyance was to cover, as far as it would, the known defalcations of the cashier, we are of opinion that the sureties are not entitled to have that property applied in discharge of their liability. The property was neither conveyed nor received for that purpose.

The plaintiffs are to have execution for four thousand dollars, and interest thereon from the 5th of May 1853.

Judgment for the plaintiffs.

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Benjamin G. Wilder *vs.* William Adams & another.

B., the owner of a patent right for making fireproof safes, granted to A. the exclusive right of making and vending the same in New England; and A., in consideration thereof, agreed by indenture with B. to keep a true account of the number of "said safes," and the weight of each, made or sold by him, and to pay B. one cent a pound on the weight of "said safes so sold;" that "all safes" made or sold by A., "consisting of a double case or box, with the intermediate space filled with plaster or other non-conducting substance, shall be considered as coming within this agreement, and accounted for as above stipulated;" that A. would not carry on the manufacturing of "said safes" out of the city of Boston and its environs, without B.'s consent, nor offer "any such safes" for sale out of New England, and would furnish a sufficient supply of "said safes" for the demand therefor in New England at a limited price, made of good material and in a workmanlike manner; and that "the safes sold under the said license" should be marked with the name of B.'s patent; and the parties mutually agreed that any discovery or improvement in the manufacture of "said safes," that might be acquired by either, should be communicated to and be for the benefit of the other, whether patented or not; and that they would bear equally the expense of any suit that might be instituted by either in New England for infringement of the patent. The specification of the patent covered only safes filled with plaster of Paris. *Held*, that A. was bound to account to B. for all safes manufactured and sold by A., not constructed in conformity with the specification, and in which the intermediate space was filled with any non-conducting substance, though substantially and materially different from plaster of Paris. *Held*, *also*, that B. was entitled to receive one cent per pound of the weight of all safes, made in infringement of the patent, for which suits had been brought and damages recovered at their joint expense.

Action of contract upon an indenture executed on the 23d of September 1843, between the plaintiff of the first part, and the defendants, William Adams and Artemas Hammond, of the second part, by which, in consideration that the plaintiff by his license of even date, (the body of which is copied in the margin,*) granted and assigned to the defendants "the exclusive

* Be it known, that whereas the undersigned, Benjamin G. Wilder, of Mamaroneck in the State of New York, is proprietor of a patent granted to Daniel Fitzgerald on the first day of June eighteen hundred and forty three, for an improvement in fireproof chests or safes, patented as the Salamander Safe, said Wilder hereby, in consideration of the agreement this day made by said Wilder, on the one part, William Adams and Artemas Hammond, on the other part, grants and assigns to Adams & Hammond the exclusive right and privilege of making and vending said safes in the New England States, for and during the unexpired period of said patent, and for such period as the same may be renewed or continued for; this license being given however subject to the condition that said Adams & Hammond shall comply with and fulfil said

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right and privilege of making and vending in the New England States the fireproof chests or safes, commonly known as the Salamander Safe, for which a patent was granted to Daniel Fitzgerald on the first of June 1843 — said license being for and during the period for which said patent is granted, and for such period as the same may be renewed or continued for — said Adams & Hammond, for themselves and their respective executors and administrators, hereby covenant and agree with said Wilder, his executors and administrators, to keep a true account of the number of said safes made and the number sold; which account shall be open to the inspection of said party of the first part at all convenient times; and at the expiration of every month, on request made to said parties of the second part, or either of them, to render an account by mail, addressed as said party of the first part shall direct, or to such person in Boston as he may nominate, a true account of the number of said safes, and the weight of each, made or sold by them or either of them, or under the authority or with the consent of them or either of them, during the then preceding month, or subsequently to the date of the preceding account rendered, and of the names of the persons to whom the same shall have been sold; and to pay to said Wilder one cent per pound on the weight of said safes so sold during such period. And all safes made by said Adams & Hammond, or either of them, or in the making or selling of which they or either of them shall be concerned, consisting of a double case, or box, with the intermediate space filled with plaster or other non-conducting substance, shall be considered as coming within this agreement, and accounted for as above stipulated.

agreement on their part; the same being the only agreement of even date herewith between said parties, and being witnessed by the same subscribing witnesses as this license. And on the failure of said Adams & Hammond, at any time, to comply with and fulfil said agreement on their part, this license is thereupon to become null and void, and the exclusive right and privilege thereby granted is thereupon to revert to said Wilder, his executors, administrators, and assigns; but such forfeiture is not to bar or defeat his right of action, remedy, or claim for damages on said agreement, which said Wilder, his executors, administrators, or assigns, might otherwise have had.

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"Said Adams & Hammond agree not to carry on the manufacturing of said safes out of the city of Boston and its environs, without the consent of said Wilder or his assigns; and not to offer, or directly or indirectly authorize, consent to, or promote, or be concerned in the offering of, any such safes for sale out of the New England States. Said Adams & Hammond further agree to furnish a sufficient supply of said safes for the demand therefor in New England, at a price not exceeding twelve and one half cents per pound, besides extra work and improvements, the same to be made of good materials, in a workmanlike manner; it being understood that they are not bound to offer them on sale in any other places than Boston, but that they may offer them in other places in New England in case they deem it advantageous so to do. The safes sold under the said license are to be marked 'Wilder's Patent Salamander Safe.'

"The parties of the second part further agree not to give any license for making said safes, without the written authority or consent of the party of the first part. And it is mutually agreed by said parties, that any discovery or improvement in the manufacture of said safes that may be made, purchased or acquired, by either of the parties hereto, or the assigns or representatives of either, shall by such party be communicated to the other party; and that such other party shall be entitled to the benefit thereof during the continuance of said license, without payment of any additional consideration therefor, whether such improvement or discovery shall be patented or not.

"It is further mutually agreed by the parties, that they will bear equally the expense of any suit that may be instituted by either in any of the New England States for any infringement of said patent; and that the party, before instituting any such suit, shall give notice to the other of the intended institution of the same, and give the opportunity to join in the prosecution of the same; and neither party shall allow, by his consent, judgment in such suit to be rendered against the patentee, or any one claiming under him, on the ground of the invalidity of said patent.

"And it is further agreed by said parties, that, in case final

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judgment shall be given against said patentee, or any claiming under him, in any suit in any part of the New England States, on the ground of the invalidity of said patent, said Adams & Hammond shall, from and after the rendering of such judgment, be exonerated and discharged from this agreement as to any subsequent sales of said safes, but that they are not thereby to be exonerated and discharged from any payment that may become due under this agreement previously to the rendering of such judgment."

The declaration contained two counts; the first for fraudulently refusing to render any account of the sales made or the moneys received under the indenture; and the second for the one cent per pound on the weight of each of the safes, made by third parties in infringement of the patent, and for which infringements damages had been recovered and received by the defendants in suits brought by them, half of the expenses of which had been paid by the plaintiffs, according to the agreement.

At the trial before *Hoar*, J., it appeared that the safe for which the letters patent had been granted, as described in the specification annexed to them, consisted of two chests or boxes, one inside of the other, with the intermediate space filled with plaster of Paris, either alone, or with sheets of mica in it; that the defendants had duly accounted and paid for all the safes manufactured by them, between the date of the agreement declared on and the date of the writ, which were constructed in conformity with the specification; but that between those dates the defendants had manufactured and sold some safes consisting of a double case or box, with the intermediate space filled with hydraulic cement, which could be made and sold at a profit if a royalty was not payable to the plaintiff, but at no profit if it was, and which, it was agreed, were not constructed in conformity with the specification; hydraulic cement, though an imperfect conductor of heat, being substantially and materially different as a non-conducting filling for safes from the filling described in the specification; that for these safes the defendants had refused to account, and that they had also received certain sums, as alleged in the second count of the declaration.

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For the purpose of settling the questions of law involved, the judge directed a verdict for the defendants, and reported the case for the consideration of the full court.

C. Browne, for the plaintiff, cited, on the question of the construction of the agreement, *Heywood* v. *Perrin*, 10 Pick. 230; *Jones* v. *Lees*, 1 H. & N. 189; *Brancker* v. *Molyneux*, 1 Scott N. R. 563, 565; *Deriemer* v. *Fenna*, 7 M. & W. 439; 2 Parsons on Con. 26, and cases cited.

B. R. Curtis & J. A. Andrew, for the defendants, cited *Barton* v. *Fitzgerald*, 15 East, 541; *Martin* v. *Wright*, 6 Ad. & El. N. R. 917; *Kendall* v. *Almy*, 2 Sumner, 293; *Warren* v. *Merrifield*, 8 Met. 96; Broom's Max. (3d ed.) 523; 2 Parsons on Con. 13.

Hoar, J. 1. The principal question in this case is whether the provision in the contract between the parties, that "all safes made by said Adams & Hammond, or either of them, or in the making or selling of which they or either of them shall be concerned, consisting of a double case or box, with the intermediate space filled with plaster or other non-conducting substance, shall be considered as coming within this agreement, and accounted for as above stipulated," applies to safes so constructed, and filled with hydraulic cement, or is to be confined in its application to safes filled in whole or in part with plaster. The contract is of even date with a license from the plaintiff to the defendants to manufacture safes under a patent held by the plaintiff; and the specification annexed to the patent includes only safes filled with plaster of Paris, or with plaster of Paris and sheets of mica. It is agreed that hydraulic cement, though an imperfect conductor of heat, and thus included in the phrase "non-conducting substance," differs substantially, as a filling for safes, from the material described in the specification. The defendants claim that the words "filled with plaster or other non-conducting substance" are to be interpreted as having the same meaning with "plaster, or its equivalent under the patent;" and they argue that "other non-conducting substance" either refers simply to the plaster mixed with mica, described in the specification, or is used to embrace such future substitute for the plaster filling as might afterward be discovered by the patentee.

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The strength of the argument on that side of the case is found in the consideration that the object of the agreement is to regulate and prescribe the terms upon which the patented safes may be made and sold under the patent; that most of its clauses could have no proper application to any safes other than those protected by the patent; and that the expression, "said safes," which follows and includes the safes referred to in the clause in controversy, as well as those for which the license is given, is used in the agreement not to manufacture outside of Boston and its environs, in the agreement not to sell out of New England, and in the agreement to furnish a full supply for the New England market; and that these stipulations could have no reasonable application to any other safes than those protected by the patent.

While there is much force in these suggestions, and the true meaning of the parties may not be wholly free from doubt, we think the reasons for the construction adopted by the plaintiff are on the whole stronger and more decisive.

The language of the clause in question, in its literal and obvious meaning, includes the safes filled with hydraulic cement. If no other than the patented safes were intended, there could be no need of such a clause, as full provision was already made for the account to be rendered of them. When the stipulation for marking the safes is introduced, the language is changed, and instead of "said safes," we find the limitation, "the safes sold under the said license." It is also apparent that the plaintiff might have a motive to guard against the manufacture of inferior safes, which might come into injurious competition with those which were to be made under the license; and an agreement for an equal payment to be made for each might secure this important protection. Indeed it is shown by the facts agreed at the trial that the manufacture of the safes filled with hydraulic cement could be profitably carried on if no payment were made upon them under the contract, but that it would be unprofitable if such payment were exacted.

We think therefore that, while the phrase "said safes" may have been only intended to refer to those which had been

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chiefly the subject of description and agreement before mentioned, and not to those which had been included in the obligation to account as a supplemental and distinct class, yet if the latter were held to be included, as in strict grammatical construction they would be, no such unreasonable consequences would follow as to induce us to give a construction to the phrase "other non-conducting substance" more limited than its natural import.

2. We are also of opinion that the plaintiff may maintain his action, upon proof of the facts alleged in the second count of the declaration. The money recovered by the defendants as damages for making and selling the patented safes was, by a just construction of the agreement, in part money received to the plaintiff's use. The judgment for damages would vest in the defendants in that suit, or their vendees, the right to use the specific article, for the making of which in violation of the patent damages were assessed. This right was the one sold by the plaintiff to the defendants under the license, for each exercise of which payment was to be made. If a person had tortiously taken a manufactured safe from the defendants, and an action were brought, and the value of the safe recovered by them, this would certainly be equivalent to a sale, and certainly ought to subject them to the payment which they had contracted to make to the patentee in case of a sale. Beside, the agreement provides for bringing suits for violations of the patent at the joint expense of the parties — thus recognizing a joint interest in the subject matter of the suit. But the amount which the plaintiff can recover will depend materially upon the fact whether he did contribute to the expenses of the suit; if he did not, it will only be the net proceeds of the suit, after deducting all costs and expenses, in which he would have any claim to participate; and in those, only in the proportion of the royalty at the rate of one cent a pound to the whole damages recovered.

If the suit were brought by the defendants alone, and at their own expense, there might be circumstances which would justify the jury in finding that the plaintiff had consented that they should bring it at their own risk and for their own exclusive benefit. *Verdict set aside, and new trial granted.*

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Alexander Campbell *vs.* Augustin S. Bemis.

A writ of entry to foreclose a mortgage cannot be maintained against the mortgagor alone after his estate has been conveyed to a third person, and by him conveyed, since the *Sts.* of 1845, *c.* 208, and 1855, *c.* 304, to the mortgagor's wife to her sole and separate use; although the mortgagor has continued to occupy the premises with his wife and family, providing for their support and maintenance.

Writ of entry, dated June 21st 1858, to foreclose a mortgage of a house and land in Boston. Plea, nul disseisin, with a specification of defence that at the time of the suing out of the writ and ever since the defendant had no estate in, or claim to, or possession of, the premises.

At the trial in the superior court of Suffolk at May term 1859, the following facts were proved or admitted: On the 1st of October 1856, the demanded premises were conveyed by the plaintiff to the defendant in fee, and were mortgaged back by the mortgage declared on, in which the defendant's wife joined in release of rights of dower and homestead. On the 1st of October 1857 the defendant's wife paid to the plaintiff the money then due on the mortgage, and took an agreement from him that, on the payment of the rest of the mortgage debt, he would assign the mortgage to her. On the 1st of April 1858 the defendant took the benefit of the insolvent laws, on the 13th an assignment was made of his estate, and on the 21st of April 1858 his assignee conveyed the demanded premises, subject to the mortgage, to the defendant's wife, to her sole and separate use, free from the interference or control of her husband. At the time of the execution of the deed from the plaintiff to the defendant and of the mortgage back, the plaintiff moved into the house with his wife and family, and resided there constantly ever since, providing for their support and maintenance.

Upon this evidence, *Nash*, J. ruled that the plaintiff was entitled to a conditional judgment and directed a verdict for him, and the defendant alleged exceptions.

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J. L. English, for the defendant.

J. P. Healy, for the plaintiff. This is an action for possession, and may be maintained against the tenant of the freehold, or whomsoever has the actual possession and withholds it from the plaintiff; and a mortgagor may always be joined as a defendant. Gen. Sts. *c.* 140, § 8. *Hunt* v. *Hunt*, 17 Pick. 118. *Wheelwright* v. *Freeman*, 12 Met. 154. The defendant, when he took possession, entered as tenant of the freehold, and has never surrendered that possession to any person, but has continued to hold it to the present time.

Bigelow, C. J. Under the plea of nul disseisin, accompanied by a notice that the defendant relied upon a special matter in defence of nontenure and disclaimer of all estate in or claim to the possession of the demanded premises at the time of the commencement of the action, the plaintiff could not recover, unless he could show that when the action was brought the defendant might have been rightly regarded as tenant of the freehold. *Wheelwright* v. *Freeman*, 12 Met. 154. *Johnson* v. *Phillips*, 13 Gray, 198. This must be so, because it is clear that the action could not be maintained against the defendant alone on the ground that he was the original mortgagor, inasmuch as he had parted with all his estate in the premises. In such case he was only liable to be "joined" as a defendant with the tenant of the freehold under the Rev. Sts. *c.* 107, § 8. Nor could he be treated as tenant of the freehold by disseisin, because there was no evidence in the case of any demand for possession of the premises of the defendant, or that the estate was withheld by him from the plaintiff.

Was he then tenant of the freehold by virtue of his possession when the action was brought? Upon the facts in proof it appeared that the right to redeem the premises had become vested in the wife of the defendant by a conveyance in fee to her sole and separate use, free from the interference and control of her husband; and that after this conveyance, and up to the time of the commencement of this action, the defendant had continued to occupy the estate with his wife and family in the same manner as he did before the right to redeem

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the premises passed from him to his assignee in insolvency. In ordinary cases, as possession is presumed to follow title, the legal inference would be, where a grantor and grantee are both in possession at the time of a grant, that on a change of title the possession of the premises passed to the owner of the estate. In other words, when a person in occupation of an estate conveys it to another, who is also in occupation of the premises, the legal presumption would be, in the absence of proof, that after the conveyance the grantee became tenant of the freehold, and the continued possession of the grantor would be deemed to be permissive and in the right of the legal owner of the estate. If the principle is applicable to the present case, it would follow that the defendant was not in any sense tenant of the freehold; but that he occupied the premises solely in the right of, and by consent of, his wife, in whom the legal title was vested. Taking into view the provisions of our statutes concerning the tenure by which married women hold lands conveyed to them for their sole and separate use, we can see no reason why the case does not fall within this principle. By the *Sts.* of 1845, *c.* 208, § 5, and 1855, *c.* 304, the wife was capable of holding the estate to her sole and separate use, free from the interference and control of her husband, and it was not subject to the disposal of the husband. She had power to make contracts respecting it in her own name, to lease it for a term not exceeding one year, without the assent of her husband, and generally to exercise the same rights and powers in respect to it "as if she held the same, being unmarried." Her husband had no control over it, or power of disposing of it, and no interest in it, except an inchoate right of tenancy by the curtesy, which gives him no claim of personal possession. She must therefore be regarded as tenant of the freehold, and his possession must be deemed to be permissive only, subject to the right and interest of his wife as owner of the fee. *Beal* v. *Warren*, 2 Gray, 447, 458. *Conant* v. *Warren*, 6 Gray, 562.

Exceptions sustained.

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Hiram Peaslee *vs.* William McLoon.

The indorsee of a promissory note may maintain an action thereon in his own name, although the property in the note continues in the indorser.

Since the *St.* of 1852, *c.* 312, § 60, the wife of a person interested in the result of a suit, but not a party to the record, is a competent witness in his behalf.

Action of contract on a promissory note made by the defendant, payable to Daniel Peaslee or order, and by him indorsed in blank. The answer put in issue the indorsement of the note to the plaintiff.

At the trial in the superior court of Suffolk at March term 1859, before *Huntington*, J., Daniel Peaslee, a resident of New Hampshire, testified that the note in suit belonged to him, and that he procured it to be sued in the name of his brother, the plaintiff, (who resided in this commonwealth and had no interest in the note,) in order to avoid the necessity of getting an indorser of the writ, and to enable his wife to be a witness, the whole expenses of the suit being borne by him, and the suit being prosecuted entirely for his benefit; and that the plaintiff directed the suit to be brought in his own name. Upon this evidence, the defendant objected that the action could not be maintained in the plaintiff's name. But the judge overruled the objection, and submitted to the jury the question whether the note had been delivered by Daniel Peaslee into the possession and control of the plaintiff to be sued in his name, and the action brought and prosecuted by the plaintiff's direction and assent.

The plaintiff then called the wife of Daniel Peaslee as a witness. The defendant objected that she was incompetent. But the judge overruled the objection and permitted her to testify, and her testimony had an important bearing on the case.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

S. Wells, for the defendant, to the point that the wife of Daniel Peaslee was not a competent witness, cited *Sts.*

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1852, *c.* 312, § 60; 1857, *c.* 305; 1859, *c.* 230; Rev Sts *c* 96, § 11; *Tyler* v. *Ulmer*, 12 Mass. 163; *Sylvester* v. *Crapo*, 15 Pick. 92; *Griffin* v. *Brown*, 2 Pick. 304; *Barrett* v. *Barrett*, 8 Pick. 342; *Bailey* v. *Bryant*, 24 Pick. 198; *Thayer* v. *Union Tool Co.* 4 Gray, 75; *Savage* v. *Balch*, 8 Greenl. 27; *Hackett* v. *Martin*, 8 Greenl. 77; *Matthews* v. *Houghton*, 1 Fairf. 420; *Frear* v. *Evertson*, 20 Johns. 142; *Dowden* v. *Fowle*, 4 Campb. 38; 1 Greenl. Ev. §§ 172, 175, 180, 334, 335; 2 Stark. Ev. (8th Amer. ed.) 28.

T. Willey, for the plaintiff.

CHAPMAN, J. The note in suit was given to Daniel Peaslee, who transferred it to his brother the plaintiff, to save the trouble of getting an indorser of the writ, and to enable his wife to be a witness. He is still the owner of the note, and this action is brought in his brother's name for his sole benefit. It is objected that the plaintiff has not a sufficient title to the note to sustain this action. But the law is settled otherwise, and the instruction given to the jury was correct. *Beekman* v. *Wilson*, 9 Met. 434.

The wife of Daniel Peaslee was permitted to testify on the trial on behalf of the plaintiff, and to this the defendant excepts. The exception raises one among many interesting questions that grow out of the recent changes made by statute in the law of evidence.

At common law, she could not have been a witness. If her exclusion in such a case rested solely on the ground of a community of interest with her husband, she was admissible at the time of the trial, because the *St.* of 1852, *c.* 312, § 60, removes that objection in respect to him as well as in respect to her husband. She was admitted on this ground.

But there are cases in which a wife was excluded at common law on another ground, namely, that of public policy. It was to protect the confidential intercourse of private life, to prevent family discord, to relieve the wife from the risk of offending her husband, and from exposure to the temptation to testify untruly in his behalf, either through coercion or otherwise. This ground of exclusion is often stated in the books in connec-

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tion with that of community of interest. Our statute, above referred to, does not remove that ground of incompetency, but leaves the law as it stood before.

The doctrine is stated very broadly in the English treatises on evidence, and in some of the adjudged cases. Yet by the general current of the authorities it is limited to the protection of confidential communications and to cases where the husband and wife were also excluded as parties or from interest. In cases where neither was so directly interested in the event of the suit as to be excluded on that account, both were allowed to testify quite freely. The rule in such cases is stated by Phillips as follows: "Although the husband and wife are not allowed to be witnesses against each other, where either is directly and immediately interested in the event of a proceeding, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of the one tends to contradict the other or may subject the other to a legal demand or even to a criminal charge." 1 Phil. Ev. *c.* 4, § 4; (4th Amer. ed.) 84. Yet the alleged consideration of policy has often as much force where the interest in the suit is indirect and collateral, and indeed where there is no interest in it, as when the interest is direct. The statement of facts by one on the stand, tending to expose the other to a legal demand or a criminal prosecution, or in contradiction to the testimony of the other, must have as much tendency to create discord in the one case as in the other. Where in the case of *Henman* v. *Dickinson*, 5 Bing. 183, the wife was called to prove that her husband had fraudulently altered a bill of exchange, her testimony must have had as much tendency to create discord as if her husband had been a party to the suit. A similar remark would apply to several other English cases, where the wife's testimony was received.

So long as all interested persons were excluded from giving evidence, there was no occasion to examine and limit the consideration of policy very accurately. The question has arisen in this case in consequence of our statute, which takes away the objection of interest. And after that objection had been

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removed by statute in England, the subject of policy soon came up for discussion there.

In *Stapleton* v. *Crofts*, 18 Ad. & El. N. R. 367, it was discussed by Erle, J., who reviewed many of the cases, and expressed the opinion that by the common law it was merely identity of interest, and not considerations of policy, that excluded the wife when the husband was excluded on account of interest. The other judges were of a different opinion. But the point in issue in that case was whether the *St.* of 14 & 15 Vict. *c.* 99, made the wife competent where the husband was the party to the record. The same point was raised in *Barbat* v. *Allen*, 7 Exch. 609. Both cases turned upon the construction of the English statute, and do not therefore decide the point raised here. There is a good collection of the cases relating to the question of policy in 2 Bennett & Heard's Leading Criminal Cases, 250, in a note to *The King* v. *All Saints*, 6 M. & S. 194. See also 1 Phil. Ev. 89, note 45, in which the learned editors remark that the notion of such testimony being inadmissible from policy seems to be pretty much given up in England, though several American cases have gone on that ground.

In the discussions of this subject, the following considerations do not seem to have been noticed. If either the husband or wife was so interested that neither could testify, the release of the interest to that one made both of them competent. So the opposite party, against whom they were interested, could call either or both of them. It would seem to follow conclusively from this, that interest, and not policy, determined the question. If this be so, the statute which makes persons competent notwithstanding the interest, admits the wife as well as the husband. The *St.* of 8 & 9 Vict. *c.* 95, § 83, makes husbands and wives competent and compellable to give evidence for and against each other in the county courts; and by *St.* 16 & 17 Vict. *c.* 83, they are made competent and compellable to testify on behalf of either party to a suit in the higher courts, except in criminal cases and cases of adultery, and except that they cannot be called to disclose any communications made by either to the other during marriage. By our Gen. Sts. *c.* 131,

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§ 14, husband and wife may testify for and against each other when the wife is a party or one of the parties; only they shall not be allowed to testify as to private conversations with each other. It thus appears that both here and in England the policy of protecting the wife in such cases is now regarded as unimportant in comparison with the policy of extending the means of ascertaining truth in the trial of causes. And undoubtedly she stands in less need of protection now than formerly. The relation of husband and wife has been greatly modified since the early days of the common law. The old doctrines respecting his right to chastise and imprison her for disobedience have become obsolete. His power to control her by means of his exclusive right to their children is so far destroyed that the decrees of courts in regard to the custody of children now have respect to the interests and feelings of all the parties. Our recent legislation gives to her a reasonable degree of pecuniary independence, to say the least. But still more has been done for her by our system of universal education. It gives her a social equality with her husband, and in many cases she is his acknowledged superior. He therefore becomes accustomed to expect from her a free and independent expression of opinions, and a fearless regard to truth in the statement of facts. It is not now to be supposed that any man would expect or desire his wife to pervert or conceal the truth, when called into court to testify on oath. The idea of family discord growing out of such testimony, merely because it is adverse to his pecuniary interest, ought to be obsolete. Much less is personal violence and restraint to be feared.

Our conclusion is that, in a case like the present, the reason for excluding the testimony of the wife always was identity of interest with the husband, and nothing else; and that the statute, which makes the husband competent notwithstanding his interest, makes his wife competent also. And we think that the argument against her admissibility on the ground of policy has not now the force which it formerly had, when greater ignorance and rudeness prevailed, and when the power of the husband over her was much greater than it now is.

Exceptions overruled.

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THOMAS HOWE *vs.* BOSTON CARPET COMPANY.

One manufacturing corporation may take shares of another in payment of a debt; and neither the first corporation, nor any person taking from it, with knowledge of all the facts, a negotiable promissory note of the second corporation, can, in an action thereon against the latter, summon in other stockholders and have execution against them, under *St.* 1851, *c.* 315.

Under the Rev. Sts. *c.* 38, §§ 17, 22, the notice required to be published annually by the directors of a manufacturing corporation, in order to exempt the stockholders from liability for its debts, may be published at any time within a year from the filing of the certificate of capital stock.

ACTION OF CONTRACT against a manufacturing corporation, in which several persons were summoned in as stockholders under *St.* 1851, *c.* 315. The case was submitted to the decision of the court upon agreed facts, which are stated in the opinion.

F. A. Brooks, for the plaintiff, cited *Hood* v. *New York & New Haven Railroad*, 22 Conn. 502; *Mutual Savings Bank & Building Association* v. *Meriden Agency Co.* 24 Conn. 163; *Straus* v. *Eagle Ins. Co.* 5 Ohio State R. 59; *Colman* v. *Eastern Counties Railway*, 10 Beav. 1; *Whittenton Mills* v. *Upton*, 10 Gray, 582; *Bangs* v. *Lincoln*, 10 Gray, 600; *Thayer* v. *Union Tool Co.* 4 Gray, 75; *Gray* v. *Coffin*, 9 Cush. 206; *Holyoke Bank* v. *Goodman Paper Manuf. Co.* 9 Cush. 582; *Pitcher* v. *Barrows*, 17 Pick. 363; *Thayer* v. *Buffum*, 11 Met. 398; Rev. Sts. *c.* 38, §§ 17, 22.

J. G. Abbott & B. F. Brooks, for the stockholders.

CHAPMAN, J. The right of the plaintiff to recover against the corporation is not contested; but the several stockholders who are summoned in deny their liability. The notes on which the action is brought (being eight in number) were all, except one, purchased by the plaintiff of the Baldwin Company, a manufacturing corporation. The plaintiff was the president and one of the directors of the Baldwin Company, and purchased the notes at a discount of fifty per cent., after all but one of them were overdue, and after he had been informed that the makers had failed, and only a few days before they took the benefit of the insolvent laws.

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The Baldwin Company held twenty seven shares of stock in the Boston Carpet Company while they were holders of these notes, and until a short time before this sale of their notes to the plaintiff, namely, from June 1st 1853 to July 28th 1854; having received the shares in payment of a debt due to them from the Boston Carpet Company.

It has been decided that an individual stockholder, though he may maintain an action against the corporation, cannot summon in his co-stockholders under *St.* 1851, *c.* 315, and have execution against them for his debt. *Thayer* v. *Union Tool Co.* 4 Gray, 75. It was further decided, in the same case, that he can gain no advantage in this respect by transferring his note to a third person, and bringing a suit for his own benefit in the name of such person. The law looks through the forms of the transaction to its substantial equity. The same doctrine should be applied to a corporation which is the creditor of another corporation, and is at the same time one of its stockholders.

It is contended that this cannot be so in the present case, because it is said the Baldwin Company, being a mere manufacturing corporation, had no legal right or power to hold stock in the other corporation, and therefore it cannot be truly alleged that it was a stockholder.

That there is some limitation upon the power of corporations to invest their funds in the stock of other corporations cannot be doubted. In *Hood* v. *New York & New Haven Railroad*, 22 Conn. 502, it was held that a railroad corporation could not engage in the business of running stage coaches, and that a passenger who was injured in a stage coach owned and run by the corporation could not recover of them for an injury happening through the negligence of the driver. So in *Mutual Savings Bank & Building Association* v. *Meriden Agency Co.* 24 Conn. 159, it was held that a corporation established for a general insurance agency, commission and brokerage business, could not legally subscribe for stock in a building association and savings bank, and that an action would not lie on such subscription to collect assessments. Yet these decisions rest partly upon special statute restraints, and on that account do not aid us much in determining the present case.

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In *Hodges* v. *New England Screw Co.* 1 R. I. 312, and 3 R. I. 9, the subject is well discussed, and it is held that one corporation may take stock in another for payment of a debt; while a doubt is expressed whether it may take such stock for permanent investment. The question has been discussed in several other cases out of this commonwealth, which we need not cite, because it was not presented in such an aspect as to afford us much light in the present case.

In *Treadwell* v. *Salisbury Manuf. Co.* 7 Gray, 393, this court held that a manufacturing corporation could by vote of a majority of the stockholders sell out its whole property to another manufacturing corporation, and take its pay in the stock of that company. In that case it is said that while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case.

The legality of the transaction could not have depended upon the intention of the corporation to wind up its affairs immediately. If it had taken the stock in payment for goods, or for the sale of a building or land or water power which it did not want or desired to sell, while it still carried on its business, the act must have been equally legal. We have no occasion to say how it would have been if the stock had been purchased for permanent investment. If such a question should arise, it would require much consideration. A great part of the business of the community is done by means of corporate organizations. The State itself is a body corporate; so are counties, towns, and lesser municipalities. Education is managed principally by corporations, not only in the form of school districts, but of colleges, academies, libraries, &c. Travel and transportation are on railroads managed by corporations. Banking, insurance, manufacturing, and trade are largely managed by like instrumentalities. It would be difficult for many of them to manage their business and collect their debts if they could not, at least temporarily, hold the stock of other corporations. Some of them, as savings banks, for example, are restrained by

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statute. But corporations established for manufacturing and trade are under no statute restrictions which can apply to a case like the present. And if any of them were to make illegal investments in the stock of others, it would not follow that the stock would be a nullity in their hands. They might be subjected to a forfeiture of their charter, or stockholders might apply to the court to restrain them. Their contracts might to some extent be held void. But by holding certificates of the stock they could not exempt themselves from responsibility to innocent third persons, nor acquire rights which legal holders did not possess. Nor would the objection to the illegal traffic in stocks be a mere technical one that could be evaded by holding the stock in the name of an individual, as it would seem to be were we to adopt the plaintiff's view.

On consideration of the whole subject, we are of opinion that the Baldwin Company had a legal right to take this stock as it did for payment of a debt; and that it then became a co-stockholder in the defendant company with those who are summoned in, and could not transfer to the plaintiff, its president, he knowing all the facts, a right against the defendants which it did not itself possess. The plaintiff purchased the notes, subject to all the equities existing between the defendants and the Baldwin Company, and these rights were not affected by a transfer of the stock of the Baldwin Company a short time previous to the sale of the notes to the plaintiff.

The note dated June 12th 1854 and payable on demand was not purchased of the Baldwin Company, and the liability of the stockholders depends upon other considerations. By the Rev. Sts. *c.* 38, § 16, the stockholders are jointly and severally liable for the debts of the company till the capital stock shall be paid in and a certificate thereof made and recorded in the registry of deeds. Section 17 prescribes the form of the certificate and the time within which it shall be filed. Section 22 requires the corporation to give notice annually in some newspaper, published as therein prescribed, of the amount of assessments voted and paid in, and the amount of all their existing debts; and provides that if they fail to do this, the stockholders

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shall be liable for all their debts then existing, or afterwards contracted before the notice is given.

The word "annually" is somewhat equivocal; for it may relate to the calendar year, or the period of holding annual meetings, or the time when the capital stock is paid in, or the time when the certificate is filed in the registry of deeds. Some light is thrown upon the question by St. 1829, c. 53, § 7, which provided that the publication should be made annually after the filing of the certificate. It does not appear that any change was intended to be made in this provision by the revision of the statutes; and we are of opinion that, by the most natural construction of the language of the Revised Statutes, the year commences at the time of filing the certificate. This note was given after the filing of the certificate, and within a year from that time publication was made. The stockholders are not therefore liable personally to pay this note.

Judgment for the stockholders.

ABRAHAM JACKSON, Administrator, *vs.* LAWRENCE RICHARDS & another.

In an action on a recognizance under the Rev. Sts. c. 104, § 10, to prosecute an appeal from a judgment of a justice's court for possession of a tenement, and to pay the rent already due and all intervening rent, damages and costs, the plaintiff, under a declaration alleging that the defendants have not paid said rent due and in arrear, and all intervening rent, damages and costs, may, if the defendant does not demur or move for a more particular statement, recover the full value of the rent, though increased since the commencement of the suit for possession.

ACTION OF CONTRACT on a recognizance into which Richards as principal and the other defendant as surety entered with the plaintiff's intestate under the Rev. Sts. c. 104, § 10, to prosecute an appeal to the superior court from a judgment of the justices' court of Boston for possession of a tenement in an action under that chapter, and to pay all rent already due and all intervening rent, damages and costs. The declaration set forth the substance of the recognizance, its return into the superior court,

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judgment in that court for the possession of the premises, and for costs, and that the defendants had not paid "said rent due and in arrear, and all intervening rent, damages and costs," but had wholly neglected so to do, and that by reason thereof the condition of the recognizance had been broken.

The answer put in issue the making of the recognizance, and, as at first filed, contained a demurrer, which was afterwards stricken out on the defendants' motion.

Trial and verdict for the plaintiff in the superior court of Suffolk at March term 1859, before *Allen*, C. J., who signed this bill of exceptions: "The plaintiff offered evidence to show the whole amount of the rent claimed to be due, it being an increased rent after suit was commenced for possession. To which evidence the defendants objected, on the ground that said rent had not been alleged in the plaintiff's declaration. The judge ruled the evidence admissible. To which ruling the defendants except."

E. M. Bigelow, for the defendants.

A. Jackson, pro se.

CHAPMAN, J. The declaration in this case contains a very general and imperfect statement that rent is due. The defendants at first demurred to it, but afterwards withdrew their demurrer, and went to trial as if the declaration were good. The exception taken by them does not raise the question whether the allegation respecting the rent is sufficient to authorize any proof on that subject; but it concedes that it is sufficient to enable the plaintiff to recover for all the rent due except increased rent. If it gave the defendants sufficient notice of the claim, it answered its purpose, however imperfectly the notice was stated. If they desired to have a more perfect statement, they might have insisted on their demurrer, or moved for a more particular statement, or objected to any evidence respecting rent. As they did neither, and as they conceded that the declaration gave them a general notice that rent was claimed, we think it was a notice that included all the rent legally due, and that the exception which they have taken cannot be sustained. *Exceptions overruled.*

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Jane Wright *vs.* William Smith & another.

In an action on a written agreement to pay a sum of money, evidence is inadmissible to show a previous oral agreement that the defendant should be allowed to deduct a sum of money then due from the plaintiff to him from the next amount which should become due from him to the plaintiff.

Action of contract on the following written agreement: "Boston, May 30, 1857. We promise to pay Mrs. J. Wright sixty dollars, if John Myers and Joseph Feaas proceed to sea in the ship Cato, agreeably to the articles they have signed, this present voyage. $60. Smith & Adams."

In the superior court of Suffolk at May term 1859, trial by jury was waived. The defendants offered evidence that on the 11th of February 1857 the plaintiff was owing them the sum of six dollars, and it was then agreed between the parties that the defendants should not press the payment of that debt, but should deduct it out of the next sum of money which should become due from the defendants to the plaintiff, they having occasionally business together; and that when the plaintiff demanded payment of sixty dollars under the agreement sued on, they claimed to deduct that debt and made a tender of the residue. But *Morton*, J. ruled that it was not competent for the defendants to control or vary the contract sued on by the evidence offered, and gave judgment for the plaintiff for the full amount. The defendants alleged exceptions.

C. G. Thomas, for the defendants.

H. C. Hutchins, for the plaintiff, was stopped by the court.

By the Court. This is a clear attempt to vary a written contract by parol evidence. The defendants offer to show that when they promised in writing to pay sixty dollars in cash, there was an agreement resting in parol proof that it should be paid by a lesser sum than they had agreed in writing to pay. Any such agreement of course became merged in the writing.

Exceptions overruled.

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WILLIAM G. LEWIS *vs.* JOSEPH G. BANNISTER.

A bill of sale cannot be impeached or avoided by the seller's creditors, or by an officer attaching it in their behalf, on the ground of duress.

ACTION OF TORT against a deputy of the sheriff of Norfolk for the conversion of a horse attached by the defendant as the property of George C. Riedell.

At the trial in the superior court of Suffolk at May term 1859, the plaintiff gave in evidence a bill of sale of the horse from Riedell to him. The defendant offered evidence that this bill of sale was extorted from Riedell against his will by the plaintiff by falsely and maliciously threatening to accuse Riedell of larceny. But *Nash*, J. excluded the evidence; and ruled "that a contract made under duress was not void, but voidable only; and the right to avoid the contract on that ground was personal to Riedell, and could not be taken advantage of by attaching creditors or by the defendant as representing them." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

S. J. Thomas, for the defendant.

I. W. Richardson, for the plaintiff.

MERRICK, J. The exceptions taken by the defendant cannot be sustained. He is undoubtedly correct in assuming that no action can be maintained to recover a demand or a claim for damages on account of an alleged unlawful conversion of property, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, or depending in any degree upon, an illegal agreement, to which he himself had been a party. But the error, under the influence of which he supposes that the evidence offered by him was admissible, consists in the misapplication of this familiar principle of law. In the present case, the plaintiff was under no such necessity. He had only to show the written contract of sale, to establish his title to the horse which was attached by the defendant. It was the latter who sought to avoid the contract by showing that it

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was obtained under circumstances which deprived the plaintiff of the right to avail himself of it. *Welch* v. *Wesson*, 6 Gray, 505.

The vendor might undoubtedly have relieved himself from the contract, and have shown that it was not entitled to have any legal effect, by proof that it was obtained from him by duress, or by other unlawful means. 2 Kent Com. (6th ed.) 453. But that is his personal privilege and right. He may allow the contract to stand, if he chooses so to do. Neither strangers nor any of his creditors have the like right; and therefore the defendant cannot justify his detention and conversion of the horse which was sold to the plaintiff by Riedell, on the ground that the seller could for himself have successfully resisted any claim of right or title which might have been asserted under the contract. And consequently the evidence offered by him to prove that it was obtained by the plaintiff from Riedell by duress was rightly excluded. *Exceptions overruled.*

Nancy Gavett *vs.* Manchester and Lawrence Railroad Company.

In an action to recover for personal injuries, if the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, it is the duty of the court to instruct the jury that he cannot recover.

A passenger in a railroad car, who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury resulting therefrom.

Action of tort for personal injuries suffered by reason of the negligence of the defendants.

At the trial before *Merrick*, J., it appeared that the plaintiff was a widow nearly seventy years of age, but in excellent health, a remarkably good walker, and a person of extraordinary activity, both mental and physical, for one of her age, who had resided in Boston for twenty five years, and had friends in Salem, N. H., whom she had for years been accustomed to visit

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alone during the summer; that, for the purpose of visiting them, on the 27th of July 1858, she went from her home in Boston, accompanied by her son, to the Boston and Maine Railroad station, where a ticket for Salem was purchased of the defendants and paid for, and she was placed by her son on the left side near the window of the second car from the engine.

The plaintiff testified: "The station at Salem is on the right-hand side. I knew when I arrived at Salem by my observation and by the conductor speaking. The conductor called out at the door in front of me. I soon got ready to leave the car. I had a carpet-bag and parasol. A lady sat at my right hand, with a babe in her arms. No delay but for the lady to move. While I was advancing to the door, the cars appeared to be in motion. I got hold of the ring to hold on. I thought the cars were going to stop instead of starting to go on. A gentleman, who asked me why I did not get there sooner, stood directly in front. I told him I came as quick as I could. It appeared as if there was a jerk, and I was thrown like one in the air." On cross-examination she testified: "I walked perfectly. The cars appeared to be in motion when I went to the door. The cars were in motion all the time. When I got to the door, the cars were in motion. When I got to the door, a man said, Why did you not come sooner? The cars were then in motion."

A witness, who was near the cars on the opposite side to that upon which the plaintiff attempted to get out, testified as follows: "I saw the plaintiff come out of the cars, step down the steps and step upon the platform. I saw her as she came out, in the cars. As soon as she stepped on the platform, it gave her a whirl and threw her between the platform and the cars. The cars stopped; I should not think more than half a minute after they came to a dead stop. When they stopped, the hind end of the rear car was opposite the station. The cars had started when she got out; they were in motion when she got upon the platform, when she fell. The cars had advanced the length of half or two thirds of a car, and she fell a little below the centre of the station. I saw the conductor before the accident on the platform of the station. I saw him on

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the platform when he got upon the rear end of front car. I did did not see them there together. The conductor had gone into the front car before the plaintiff came out; they were not there together. The cars were in motion as she came out of the door. I heard no one speak to her."

Two other witnesses, who were standing by the station on the side on which the plaintiff attempted to get out, testified that the cars stopped for about half a minute; that the conductor stood on the platform, made a motion to the engineer to go on his way, and stepped upon the hind steps of the forward car; and just after he stepped upon the steps, the plaintiff came out of the car, and undertook to step upon the platform and was thrown.

Upon this evidence, the defendants contended that the action could not be maintained; and the presiding judge, being of that opinion, directed the jury to find a verdict for the defendants, subject to the opinion of the whole court.

J. W. May, for the plaintiff. Negligence of a plaintiff, as well as of a defendant, is not a question of law for the court, but a question of fact for the jury, to be determined upon all the circumstances of the case. *Bigelow* v. *Rutland*, 4 Cush. 247. *Bradley* v. *Boston & Maine Railroad*, 2 Cush. 539. *Munroe* v. *Leach*, 7 Met. 274. *Hall* v. *Lowell*, 10 Cush. 260. *Providence* v. *Clapp*, 17 How. 161. *Paterson* v. *Wallace*, 1 Macq. 748. *Aldridge* v. *Great Western Railway*, 4 Scott N. R. 164. *Coombs* v. *Purrington*, 42 Maine, 332. *Foster* v. *Dixfield*, 18 Maine, 380. *Carlton* v. *Bath*, 2 Foster, 559. *Leicester* v. *Pittsford*, 6 Verm. 245 & cases cited. *Beers* v. *Housatonic Railroad*, 19 Conn. 566. *Park* v. *O'Brien*, 23 Conn. 339. *Hegeman* v. *Western Railroad*, 3 Kernan, 9. *Johnson* v. *Hudson River Railroad*, 6 Duer, 645. *Curtiss* v. *Rochester & Syracuse Railroad*, 20 Barb. 282. *Dougherty* v. *Stephenson*, 20 Penn. State R. 210. Negligence is a variable question, and changes with the time, place and circumstances, so that what is negligence at one time and place is prudence at another. Story on Bailments, §§ 11, 12. It is an act of the mind, and therefore outward acts cannot themselves constitute

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negligence, but are only indications of it. It is therefore a fact, the existence of which is to be deduced from the existence of other facts, and is exclusively within the province of the jury. 1 Greenl. Ev. § 48. If the court can direct a verdict for the defendant in a case like this, it may also direct a verdict for the plaintiff, leaving only the damages to be assessed by the jury.

Upon the facts proved and the possible deductions therefrom, the plaintiff was not guilty of negligence; she was an old lady, rightfully on the train as a passenger, and not only rightfully attempting to leave it at Salem, but bound to do so. With the utmost diligence she was able only to get to the door of the car before the train started; and rightfully supposing that the train was going to stop, she took hold of the ring to hold on, and while so holding on in readiness to step upon the platform, the train started with a jerk, by which she was thrown down. As she came out of the door she was asked by a man in front of her, who, if not the conductor, was undoubtedly some servant of the company, "Why did not you come sooner?" which she could not have interpreted as a notice to stop, but might well have regarded as a request to hurry.

If the plaintiff was negligent, her negligence was of such a character as not to preclude her from recovering. The evidence tends to show that she was confused and had no opportunity to reflect, or for the exercise of discretion, or to deliberate whether there was danger, but was compelled to act on the impulse of the moment. If this lack of self-possession was brought about by the defendants' negligence, they cannot take advantage of it. *Chaplin* v. *Hawes*, 3 Car. & P. 554. *Lynch* v. *Nurdin*, 1 Ad. & El. N. R. 29. *Ingalls* v. *Bills*, 9 Met. 1. *Stokes* v. *Saltonstall*, 13 Pet. 181. *Robinson* v. *Cone*, 22 Verm. 213. *Birge* v. *Gardiner*, 19 Conn. 507. In *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64, the plaintiff had no right to be in the cars.

If upon the facts proved and the inferences to be drawn therefrom reasonable men might by possibility differ in respect to the plaintiff's claim, she is entitled to have it decided by the jury. *Paterson* v. *Wallace*, 1 Macq. 748.

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B. F. Thomas, for the defendants, cited *Munroe* v. *Leach*, 7 Met. 274; *Davis* v. *Maxwell*, 12 Met. 286; *Drake* v. *Lowell*, 13 Met. 292; *Vinal* v. *Dorchester*, 7 Gray, 421; *Rowell* v. *Lowell*, 7 Gray, 100; *Kidder* v. *Dunstable*, 7 Gray, 104; *Hixon* v. *Lowell*, 13 Gray, 59; *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64; *Railroad Co.* v. *Skinner*, 19 Penn. State R. 298; *Railroad Co.* v. *Aspell*, 23 Penn. State R. 147; *Damont* v. *New Orleans & Carrollton Railroad*, 9 Louisiana Annual, 441; *Galena & Chicago Union Railroad* v. *Yarwood*, 15 Ill. 468; *Moore* v. *Central Railroad*, 4 Zabr. 268, 824; *Trow* v. *Vermont Central Railroad*, 24 Verm. 487; *Haring v. New York & Erie Railroad*, 13 Barb. 9; *Willett* v. *Buffalo & Rochester Railroad*, 14 Barb. 585; *Sheffield* v. *Rochester & Syracuse Railroad*, 21 Barb. 339; *Dascomb* v. *Buffalo & State Line Railroad*, 27 Barb. 221; *Mackey* v. *New York Central Railroad*, 27 Barb. 528; Redfield on Railways, 335, 336.

Bigelow, C. J. The line which marks and separates the respective duties and functions of the court and jury is certain and well defined. The difficulty arises in determining on which side of this line particular cases fall; that is, in deciding whether a case presents only a question of law, or involves an inquiry into facts and the inferences deducible from them. Certainly the court in all cases should be scrupulously careful not to invade the province of the jury by undertaking to decide on the weight or effect of evidence, or by refusing to submit to their consideration any question of fact, material to the issue, which may be in dispute between the parties. On the other hand, it is the clear duty of the court to decide on the legal effect of the evidence, and to say whether it is such as to entitle a party to a verdict; otherwise, the jury might be called on to decide a pure question of law. It may be said generally that it is the duty of the judge to decide whether there is any evidence; of the jury to determine upon its sufficiency. This may be illustrated by an example. Suppose the facts of a case were stated in the form of a special verdict in favor of a plaintiff. This would be supported if the facts so found comprehended all the material averments necessary to maintain the

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action. But if upon them, with all possible inferences which reasonable men might draw therefrom, there was an absence of an essential element which it was incumbent on the plaintiff to establish, there can be no doubt it would be the plain duty of the court to say, as a matter of law, that he had failed to maintain his action. In like manner, when the evidence offered by a party wholly fails to prove a material allegation, it is the province of the court to decide that no case is proved which can in law support a finding in his favor. In such case, the testimony furnishes nothing for the consideration of the jury, and it is as much the duty of the court to determine that there is no evidence to sustain the action, as to exclude evidence on the ground of its irrelevancy. If however there is a dispute about the facts, or the credibility of witnesses is drawn in question, or a material fact is left in doubt by the testimony, or there are inferences to be drawn from the facts in proof, then it would be proper to submit the case to the consideration and determination of a jury. *Company of Carpenters* v. *Hayward*, 1 Doug. 374. *Mitchell* v. *Williams*, 11 M. & W. 216. *Doyle* v. *Wragg*, 1 Fost. & Finl. 7. *Stormont* v. *Waterloo Life & Casualty Assurance Co.* 1 Fost. & Finl. 22. *Sawyer* v. *Nichols*, 40 Maine, 216.

In the case at bar, there is no dispute about any of the material facts upon which the plaintiff rests her claim to damages. If there is any discrepancy in the statements of the witnesses, the points of difference do not change in any degree the legal aspect of the case. The plaintiff not only failed to offer any evidence of ordinary care on her part at the time of the occurrence of the accident, but it appears on the estimony adduced by her in support of her case, that she was guilty of negligence, which contributed to produce the injury of which she complains. One of two facts is established by the proof. After the train had started and was in motion, the plaintiff either passed out of the door and was on the platform of the car for the purpose of attempting to leave it, or she actually stepped from the platform of the car upon that in front of the station. While thus situated, she was thrown down and

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injured. It was therefore her attempt to leave the train, after it was in motion, that directly tended to bring about the casualty which occurred. Now it cannot be doubted that the well known hazards of transportation on railroads, and the unprotected and exposed situation of persons standing on the platform of the car or attempting to leave it when the train is about to start or is actually in motion, render it unsafe for passengers to place themselves in such a situation, and preclude the idea that due care can be exercised under such circumstances. In the absence of anything to create excitement or cause alarm, the attempt to leave a car, while the train is in motion, by passing to the outside or stepping off, is *prima facie* evidence of carelessness. So it was decided to be by the court in *Lucas* v. *New Bedford & Taunton Railroad*, 6 Gray, 64, in which it was held that the plaintiff was wanting in ordinary care in attempting to leave the cars when they were in motion.

But it is urged in behalf of the plaintiff that the case at bar is distinguishable from the case just cited, because in that case the plaintiff at the time of the accident had no right to be in the cars, whereas in the case at bar the plaintiff was a passenger and was lawfully attempting to leave the train when she received the injury. The facts are so; but we do not see that they at all affect the principle applicable to this case. There is no evidence that anything happened which ought to have excited the plaintiff, or that she was placed in circumstances which occasioned her any alarm, or disturbed her thoughts or distracted her attention. She knew that the cars were in motion, and persisted notwithstanding in her efforts to leave the train. If she had remained in the car she would have been exposed to no danger. But in trying to get off after the train was in motion, she took the risk on herself of the consequences which might follow from such an act of carelessness.

It was also urged by the counsel for the plaintiff that the fact of negligence is of such a complex nature that it cannot in any case be passed on by the court, but must necessarily be submitted to the jury for their determination. But we are unable to see any foundation for such an argument. If due

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care is susceptible of being established by proof, surely there can be no difficulty in determining whether there is an absence of any proof to establish it. The argument proves too much; because, if well founded, there is no case in which the court could decide the question. But this is not so. Suppose a man riding in a car thrusts his arm out of the window, so that it comes in contact with a post erected to support a bridge; or, when the cars are in motion at a rate exceeding twenty miles an hour, without any cause for alarm, recklessly jumps from the train. In such cases, it could not be said that there was any proof of due care to be passed on by the jury, and it would be an idle ceremony to go through the form of submitting the case to their consideration. So in the present case, the plaintiff attempted to leave the car while the train was in motion. This is conceded. There was therefore no proof of due care, and no facts were shown from which any inference of such care could by possibility be drawn by reasonable men, which would support a verdict for the plaintiff. *Judgment on the verdict.*

Martha Donaldson *vs.* City of Boston.

In an action against a city for injuries caused by an obstruction in the highway, evidence that the obstruction was in the highway on the day before, and had been removed at night, is irrelevant and inadmissible.

In an action against a city for a defect in a highway, the judge declined to instruct the jury that notice to some of the principal citizens who were taxpayers might be reasonable notice to the city of the defect; and instructed them that, in order to prove such reasonable notice, it must appear that the officers of the city having charge of the streets — such as the mayor, aldermen, superintendent of streets or policemen — had actual notice of the defect, or that the defect had continued so long or been so notorious that if such officers or citizens passing had done their duty, the officers would have known it; but the jury might consider whether the defect was of such a nature that passers by, who saw it, would have been likely forthwith to have informed said officers of its existence. *Held*, that the plaintiff had no ground of exception.

Action of tort for injuries received from falling into a plumber's furnace, about a foot high and a foot in diameter, placed on the sidewalk in Southac Street in Boston.

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At the trial before *Hoar*, J., the plaintiff, for the purpose of proving reasonable notice to the defendants, introduced evidence tending to show that the furnace was placed on the sidewalk at about half past seven o'clock in the morning, and remained there until about nine o'clock, when the injury was received; and that between those hours a very large number of citizens of Boston passed through the street; and the furnace, standing in or near the middle of the sidewalk, with a fire in it, obstructed their free passage.

The plaintiff further offered to prove that the furnace was in the same place, with a fire in it, on the afternoon before, from two till seven o'clock; that it was used on both days for the same piece of work, which was done in a grocer's shop, close by; that the police officer, whose duty it was to pass through the street, and to remove or complain of all obstructions, was accustomed at that time to pass through that part of the street between eight and nine o'clock in the morning, and at certain hours in the afternoon. But there was no affirmative evidence that he did pass through the street that day. The defendants objected to the evidence offered, and the judge excluded it.

The defendants called a police officer, who testified that the place in question was in his beat, and that he saw the furnace before the accident, on the day it happened. On cross-examination, he was asked if he did not, at or near the time, make certain admissions as to his being in the street, and seeing the furnace the afternoon before, and supposing that the plumbers had a license to place it in the street; and answered that he had no recollection of such a statement, but that if he did make it, it was true. The plaintiff then called a witness to prove that the policeman did make such statements; but the judge excluded the evidence.

The plaintiff contended that notice to some of the principal citizens of Boston, who were taxpayers, might be reasonable notice to the defendants. But the jury were instructed "that in order to prove reasonable notice to the defendants of the alleged defect, it must appear that the officers of the city having charge of the streets — such as the mayor, aldermen, super-

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intendent of streets or policemen — had actual notice of the defect, or that a defect which had obstructed travel must have continued so long, or been so notorious, that, if such officers had done their duty, or citizens passing had done their duty, they would have known it; and upon the question of notoriety, the jury might consider whether the obstruction of travel was of such a nature that if citizens, passing by, had seen it, they would have been likely to have forthwith informed such officers of its existence." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

G. H. Preston, for the plaintiff. 1. The conversation which the witness did not recollect, being relevant and material, might be proved by other witnesses. 1 Greenl. Ev. § 462, note. Stark. Ev. (8th Amer. ed.) 241. 2 Phil. Ev. (4th Amer. ed.) 959. *Crowley* v. *Page*, 7 Car. & P. 791. *Smith* v. *People*, 2 Mich. 415.

2. If any citizens of Boston saw, or had knowledge of, the defect in the street, whether they did their duty or not, by complaining of such defect to the proper officers, the city had sufficient notice. *Springer* v. *Bowdoinham*, 7 Greenl. 442. *Frost* v. *Portland*, 2 Fairf. 271. *French* v. *Brunswick*, 21 Maine, 29 *Tuell* v. *Paris*, 23 Maine, 556. *Mason* v. *Ellsworth*, 32 Maine, 271

F. Haven, Jr., (*J. P. Healy* with him,) for the defendants.

Bigelow, C. J. Evidence that the furnace had been in the same place on the sidewalk of the street, upon the day previous to the accident, was irrelevant and immaterial to the issue. If it occasioned a defect or obstruction, its removal at nightfall abated the nuisance, and the defendants were then in no default in the performance of their duty. The street was safe and convenient until the furnace was again placed within its limits on the next day. But this was a separate and independent act, by a person acting under no authority or license from the defendants, occasioning a new obstruction to public travel, which had no necessary connection with that existing on the day previous, and of which the acts done on the day previous could give no notice, either actual or constructive, to the defendants. Existence of a previous defect or nuisance, which has

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been removed, has no tendency to prove a subsequent one, or to show notice to the city that another similar obstruction will be created. It was therefore incompetent for the plaintiff to show any facts in relation to the use of the furnace within the limits of the street on the day before the accident occurred.

For the same reason, the plaintiff could not prove the statements made by the police officer. They related solely to the fact of his seeing the furnace on the day previous; and being irrelevant and immaterial, it was not competent to contradict them for the purpose of impeaching his credit. It is only on matters material to the issue, that the statements of a witness can be contradicted.

Upon the question of notice to the town, the instructions were correctly stated and properly guarded. The statute requires reasonable notice to a city or town of the existence of a defect, in order to render them liable to an action for damages. Mere proof of notice to one or more of the inhabitants does not establish the requisite notice, because it is not their duty to repair the defect or remove the obstruction. The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper vigilance and care might have known it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety. In the present case, taking into view the nature of the alleged defect, and the brief time during which it had existed, we are of opinion that the instructions were sufficiently favorable to the plaintiff. See *Reed* v. *Northfield*, 13 Pick. 98.

Exceptions overruled.

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ABRAM FRENCH & another *vs.* CHARLES L. HAYWARD & others.

An order, passed without notice by a judge of probate upon the petition of a creditor, filed after the expiration and return of a commission to examine claims against an insolvent estate, alleging a contingent claim against the estate and praying the reservation in the hands of the administrator of a sum sufficient to pay to the petitioner a dividend equal to that which should be paid to other creditors, and which directs the administrator to retain the whole balance of the estate in his hands for this purpose, is no bar to a subsequent petition for distribution filed by creditors whose claims the commissioners have allowed, nor to an inquiry, upon such petition, into the merits of the alleged contingent claim.

The possible liability of surviving partners of a deceased insolvent debtor to be compelled by pending actions at law to pay notes and obligations given by him in the name of the firm without their knowledge or consent, for his private use, does not give them a contingent claim against his estate, within the meaning of the Rev. Sts. c. 68, § 5, upon which the judge of probate, in ordering a dividend among creditors who have proved their claims before commissioners against the estate of the debtor, may leave in the hands of the administrator a sum sufficient to pay a dividend equal to that paid to the other creditors.

HOAR, J. The appellants are creditors of the insolvent estate of Josiah B. Kilbourn, deceased, who have proved their respective debts before commissioners appointed by the judge of probate, and asked for a decree of distribution. The whole time allowed by law for the proof of debts expired, and the commission was returned in November 1858. In December 1858 an order was passed by the judge of probate upon the petition of French and Wells, requiring the administratrix to retain the whole balance of the estate in her hands, in order to enable her to pay to French and Wells a dividend upon a contingent claim then held by them, equal to that which should be paid to the creditors whose debts were absolute and had been proved. This order is relied on by the appellees as a conclusive answer to the petition of the appellants.

It is objected to the validity of the order, that it appears to have been passed without notice, and that no authority is given by law to the judge of probate to make such a decree. But it is enough to say, that the order is in its nature temporary, and subject to revision, and has no other force or effect than to authorize and require the administratrix to suspend the settle-

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ment of the estate until the further consideration and order of the court upon the subject matter.

Under the petition of the appellants for a distribution, a new order was passed, directing a distribution among the creditors who have proved their debts, retaining in the hands of the administratrix assets sufficient for a *pro rata* dividend upon the contingent claim of French and Wells. The appellants deny that the debt set forth in the original petition of French and Wells is such a liability or contingent claim as is intended by the provisions of the Rev. St. *c.* 68, § 5; and this is the question before us for determination.

It appears by the recitals in the petition of French and Wells, that they were partners with Kilbourn in his lifetime, and that he gave the notes and obligations of the firm for his own use, without their knowledge and consent; that they have been sued upon these obligations, and that the suits are not determined. The only contingency therefore, about the claim, is the contingency, (if it may be so called,) whether they shall be able to make a successful defence to these suits. But this is a contingency affecting the evidence only, and not the obligation. They either owe these debts, or they do not owe them. If they do not owe them, the law cannot regard as a contingency the possibility of their being compelled to pay them. If they do owe them, there is no reason why they should not at once pay them, and then make their proof against Kilbourn's estate. If as between him and them, he was the principal debtor, primarily liable, and their relation was substantially that of sureties, the case of *Cummings* v. *Thompson*, 7 Met. 132, is conclusive to show that their claim is not a contingent claim under the statute. The whole foundation of the decree being therefore erroneous, the decree itself must be reversed, and the case remanded to the probate court for further proceedings.

Decree reversed.

C. P. Curtis, Jr., for the plaintiffs.

G. M. Browne, for the defendants.

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Henry L. Williams & another *vs.* George W. Jackman & another.

A person who makes a contract in writing for the building of a ship, to be finished and ready for sea on a day and at a place named in the contract, for a fixed price, part of which he agrees to pay while the work is in progress, in regular weekly payments, without regard to the amount of work accomplished, and the remainder when the ship is ready for sea, acquires no property in the ship before her completion, although an agent employed and paid by him to superintend the construction is, by oral permission of the builders, present every day while the ship is building, making suggestions and giving directions about the work.

Action of tort for the conversion of an unfinished ship. Answer, property in the defendants as assignees of Currier & Townsend, insolvent debtors. The case was submitted to the judgment of the court, with power to draw such inferences as a jury might, upon an agreed statement of facts, in substance as follows:

On the 14th of March 1856, an agreement in writing was made between the plaintiffs and Currier & Townsend, by which the latter undertook to build, finish and complete, ready for sea, for the plaintiffs, a first-class copper-fastened ship, to be ready for sea, at a wharf in Newburyport, by the 1st of July 1856; the plaintiffs agreed to pay to Currier & Townsend, "from time to time, while said ship is building, the sum of twenty to twenty five thousand dollars, and when the ship is ready for sea, such amount as shall make altogether the sum of fifty eight thousand dollars;" and it was agreed that "no interest is to be charged on the amounts advanced" to Currier & Townsend by the plaintiffs.

On the 22d of March, the plaintiffs further agreed in writing to pay Currier & Townsend, "till the amount of twenty to twenty five thousand dollars is paid as per contract, one thousand dollars every week Saturday."

The making of the first agreement was preceded by verbal negotiations, in the course of which the plaintiffs informed Currier & Townsend that Captain Israel P. Williams would superintend in their behalf the building of the ship, and Cur-

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rier & Townsend gave their assent to this arrangement. Captain Williams had previously superintended the building of another ship by Currier & Townsend for the plaintiffs. On the 15th of March, the plaintiffs addressed a note to Currier & Townsend, stating that they had employed Captain Williams to superintend the building of the ship, and requesting that he might be considered their agent in all things pertaining to such superintendence. This note was delivered on the same day by Captain Williams to Currier & Townsend at their place of business. About the same time, Currier & Townsend began to build the ship, and carried on the work till the 9th of the following May. Every day during this time, Captain Williams was at the ship-yard where the ship was building, giving directions, making suggestions, talking with Currier & Townsend about the work, and devoting his whole time to superintending it; and the plaintiffs paid him his expenses, and three dollars a day for his services.

The plaintiffs paid three thousand dollars to Currier & Townsend on the 22d of March, and one thousand dollars on Saturday of every week thereafter, until the work was stopped. This money was paid on one occasion by one of the plaintiffs, and on every other occasion by Captain Williams, who called at the plaintiffs' place of business on Saturday of every week to receive it, and at the same time reported to them the progress made in the work. Currier & Townsend signed receipts for the money as paid on account of a ship building by them for the plaintiffs.

On the 21st of May, Currier & Townsend petitioned for the benefit of the insolvent laws, and, upon due proceedings had, the defendants were chosen their assignees, and the ship came into their possession as such. The defendants, upon notice of the plaintiffs' claim, refused to deliver the ship to them, and finished and sold her for the benefit of all the creditors.

S. E. Sewall & S. H. Phillips, for the plaintiffs. It has long been settled law in England and Scotland, and has been generally recognized in this country, that the payment by instalments for a ship built under the superintendence of the

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person for whom she is built, makes him the owner of her, from the time of the first payment. *Woods* v. *Russell*, 5 B. & Ald. 942. *Rohde* v. *Thwaites*, 6 B. & C. 392. *Elliott* v. *Pybus*, 10 Bing. 516. *Atkinson* v. *Bell*, 8 B. & C. 282. *Clarke* v. *Spence*, 4 Ad. & El. 448. *Wood* v. *Bell*, 5 El. & Bl. 772, and 6 El. & Bl. 355. *Laidler* v. *Burlinson*, 2 M. & W. 602. *Moody* v. *Browne*, 34 Maine, 107. *Butterworth* v. *McKinly*, 11 Humph. 209. Abbott on Shipping, 4, 5. Maule & Pollock on Shipping, 18, 19. Blackburn on Sales, 160, 161. Long on Sales, (Rand's ed.) 288. Story on Sales, §§ 234, 316. Chit. Con. (5th Amer. ed.) 378. Addison on Con. 223, 1034. 2 Parsons on Con. 30, note. Bell on Sales, 17.

The intention of both parties was to vest in the plaintiffs the title to the ship while building, and between them no delivery or change of possession is necessary. The intention of the vendor to pass, and of the vendee to accept, the title is sufficient. *Lanfear* v. *Sumner*, 17 Mass. 110. *Damon* v. *Osborn*, 1 Pick. 476. *Brown* v. *Bellows*, 4 Pick. 193. *Shumway* v. *Rutter*, 7 Pick. 58. *Ludwig* v. *Fuller*, 17 Maine, 162. The defendants as assignees can have no greater rights than Currier & Townsend had. *Lanfear* v. *Sumner*, 17 Mass. 115. *Lempriere* v. *Pasley*, 2 T. R. 490. *Mitchell* v. *Winslow*, 2 Story R. 637. But if delivery was necessary, the circumstances show a delivery to Captain Williams, as the plaintiffs' agent, and the rest follows by right of accession. *Glover* v. *Austin*, 6 Pick. 209. *Sumner* v. *Hamlet*, 12 Pick. 82.

In *Mucklow* v. *Mangles*, 1 Taunt. 318, there was no superintendence of the building of the vessel, and nothing was done indicating acceptance of the work; and that case was doubted by Park, J. in *Carruthers* v. *Payne*, 5 Bing. 270. In *Merritt* v. *Johnson*, 7 Johns. 473, also, there was no superintendence. The decision in *Andrews* v. *Durant*, 1 Kernan, 35, cannot overbalance the authorities already cited.

The omission, in the original contract, of any provision for superintendence is immaterial, since the superintendent was appointed and engaged in his duties the very day after the date of the contract. *Wood* v. *Bell*, above cited. Nor is the plain-

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tiffs' title affected by the fact that the amount of the weekly payments was not made to depend upon the progress of the work. It is obvious that at least one thousand dollars in value of work and materials would be put into the ship each week, and the plaintiffs would not be held to make the weekly payments agreed upon, unless at least equal amounts in labor and materials had been previously put into the ship.

B. R. Curtis & *C. T. Russell*, for the defendants, cited also *Baker* v. *Gray*, 17 C. B. 462; *Oldfield* v. *Lowe*, 9 B. & C. 73; *Tripp* v. *Armitage*, 4 M. & W. 687; 1 Parsons Marit. Law, 74; *Decker* v. *Furniss*, 4 Kernan, 611; *Low* v. *Austin*, 20 N. Y. 181; *Brown* v. *Morgan*, 2 Bosw. 485; *Comfort* v. *Kievsted*, 26 Barb. 472; *Johnson* v. *Hunt*, 11 Wend. 135; *Bonsey* v. *Amee*, 8 Pick. 236; *Sumner* v. *Hamlet*, 12 Pick. 82; *Mixer* v. *Howarth*, 21 Pick. 205; *Spencer* v. *Cone*, 1 Met. 283; *Lamb* v. *Crafts*, 12 Met. 356; *Forsyth* v. *Dickson*, 1 Grant, 26; *Clemens* v. *Davis*, 7 Barr, 263; *Pritchett* v. *Jones*, 4 Rawle, 266; U. S. St. 1850, *c.* 27, § 1.

Bigelow, C. J. Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This is the general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract.

In the case at bar, no such intent appears. The contract of the builders was to finish the vessel, and have her ready for sea at a specified place on or before a day certain. The vendees were to pay a fixed sum when the vessel was completed and ready for delivery. They were also to advance certain sums, from time to time, amounting to less than half the stipulated price, in anticipation of the completion of the work, but the sums so to be advanced were not graduated or measured by the amount of work done or of materials furnished or the progress made towards the final fulfilment of the contract. There was no stipulation to pay instalments at certain specified successive stages of the work; it was a mere agreement to make certain payments, by way of advance, which were fixed upon

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arbitrarily, without reference to the extent of the labor and materials actually expended and used for the construction of the vessel at the time they were to be made. Nor was there any right reserved to the vendees to control or direct the work, or to exercise any superintendence or control over it, during its progress. It is true that the agent of the vendees was allowed to be present in the ship-yard where the vessel was building, but this was by permission only granted by the builders. It was no part of the original contract, and the builders might, at any time, have revoked this permission, without violating any part of their agreement.

The case at bar is clearly distinguishable from the cases determined by the English courts, which have been cited in the argument. To say the least, some of those decisions rest upon very questionable grounds. They have been carefully reviewed, and the validity of the reasons by which it is attempted to vindicate them has been impugned by approved textwriters, and in judicial decisions by courts in this country. The case of *Andrews* v. *Durant*, 1 Kernan, 35, contains an elaborate discussion of all the decided cases, and an exposition of the application of the rule of law to contracts for the building of ships, adopted in the State of New York, and confirmed by subsequent decisions. *Judgment for the defendants.*

JOHN WETHERBEE *vs.* RICHARD MARTIN.

A certificate of discharge in insolvency is a bar to an action on a debt due to one who had notice of the proceedings, although he did not prove his debt against the estate, and although the certificate was granted, by consent of a majority of the creditors who had proved their debts, two days before the expiration of six months from the date of the assignment.

ACTION OF CONTRACT upon a promissory note. Answer, a certificate of discharge in insolvency.

At the trial in the superior court of Suffolk at March term 1859, the following facts were proved: The defendant applied

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for the benefit of the insolvent laws on the 17th of July 1854. The first meeting of his creditors was held, after due notice to the plaintiff and other creditors named in the debtor's schedule, on the 8th of August, when an assignee was chosen, and an assignment made to him. The second and third meetings were duly notified and held. The plaintiff's debt was not proved against the estate. On the 6th of February 1855, the defendant, having procured the assent of a majority of the creditors who had proved their debts, and three fourths in value of the sums proved, a certificate of discharge was granted.

Huntington, J. ruled that, as the discharge was granted two days before the expiration of six months from the date of the assignment, and as the note in suit was not proved against the estate, the discharge was no defence to the action. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

M. G. Cobb, for the defendant.

E. Avery, for the plaintiff.

Bigelow, C. J. This case is not distinguishable from *Journeay* v. *Gardner*, 11 Cush. 355, and *Williams* v. *Coggeshall*, 11 Cush. 444. The fact that the note in suit was not proved against the estate of the defendant is of no importance. The validity of the discharge of the debtor does not depend on the question whether a debt has been proved or not. If the requisites of the statute have been complied with, the debtor is entitled to his discharge, and it is valid as a bar to all claims, both those which were proved and those of which no proof was made. The creditor, if he desired to object to the debtor's discharge, or to have his claim enumerated in the number and amount which were to be reckoned, in order to ascertain whether the debtor had obtained the consent of a majority of his creditors who had proved their claims, and three fourths in value of the sums proved, should have taken care to have proved his claim at one of the three meetings which were held prior to the granting of the discharge.

Exceptions sustained.

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James Swan & another *vs.* James A. Easterbrooks.

A defendant, who, after entering in this court exceptions duly filed and allowed in the superior court of Suffolk, obtains a certificate of discharge in insolvency, may be allowed to waive his exceptions and plead it; and such certificate will be a bar to the action, and will discharge a bond given to dissolve an attachment therein.

Action of contract on a promissory note, returnable at May term 1856 of the superior court of Suffolk. An attachment was made upon the writ, and dissolved by giving bond according to law. At March term 1857 a trial was had, a verdict returned for the plaintiff, and exceptions filed by the defendant, and allowed by the presiding judge. The exceptions, with the action, were entered in this court at November term 1857. Afterwards, the defendant applied to the court of insolvency for the benefit of the insolvent laws, and obtained a certificate of discharge on the 10th of June 1858. He then by leave of this court waived his exceptions, and pleaded his certificate of discharge. The plaintiffs replied, not contesting the validity of the discharge; but moved that, as the exceptions had been waived, the judgment of the superior court be affirmed. But *Hoar*, J. ruled that on the pleadings the defendant was entitled to judgment. The plaintiffs alleged exceptions.

J. Field, for the plaintiffs.

T. L. Wakefield, for the defendant, was stopped by the court.

Bigelow, C. J. There being no objection to the validity of the defendant's discharge, and it having been duly pleaded, the debt due to the plaintiffs is thereby barred. It is an error to suppose that the plaintiffs have recovered a judgment against the defendant. The judgment of the superior court was vacated by the allowance of exceptions, which operated in the same manner as an appeal. When the exceptions were waived, it did not follow that the judgment below was to be affirmed. On the contrary, it then stood for such order as this

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court might deem it proper to make; and by our well settled practice, the court will permit a defendant, under such circumstances, to plead his discharge in insolvency. *Lewis* v. *Shattuck*, 4 Gray, 572. *Gardner* v. *Way*, 8 Gray, 191. *Glazier* v. *Carpenter*, *ante*, 385.

The plaintiffs can claim no rights under the bond given by the defendant to dissolve the attachment made on the original writ in this case. The condition of the bond has never been broken, and cannot be, because the discharge being a bar to the suit, the plaintiffs can recover no judgment against the defendants. *Exceptions overruled.*

EBENEZER SMITH *vs.* BOSTON AND MAINE RAILROAD.

An award upon a submission in the country, not returned into court, nor submitting questions of law to the decision of the court, is conclusive upon the parties, although the arbitrators, "at the request of" one of the parties, annex "a statement of the facts and principles upon which the foregoing award was made," "to be taken as part of said award;" and the court will not examine the questions of law arising upon that statement, especially if the facts are complicated, and the questions of law doubtful.

PETITION for the assessment of damages caused by the location of the respondent's railroad over lands of the petitioner. Answer, that after that location, on the 24th of August 1844, the parties submitted the matter in dispute to the arbitration of John M. Williams, George T. Bigelow and John P. Thorndike, by mutual bonds, containing this stipulation: "The award of such arbitrators, or the major part of them, given in writing under their hands to be final and binding upon the parties to said submission;" and that the arbitrators did lawfully award, judge and determine all the matters so submitted to them, and did publish and make known their award to the parties.

The award recited the submission, and awarded that forty thousand dollars be paid by the respondents to the petitioner "pursuant to the terms and conditions in the bonds aforesaid contained, in full satisfaction and discharge of and for his lands

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and damages aforesaid." Below the signatures of the arbitrators to the award was a memorandum, likewise signed by them, that "a statement of the facts and principles upon which the foregoing award was made is, at the request of the said Smith, hereto annexed, signed by the said arbitrators, and to be taken as part of said award;" and such a statement was annexed accordingly. The nature of its contents is sufficiently stated in the opinion. The award was not returnable into court, and neither the award nor the annexed statement of facts contained any submission of the questions of law arising upon them to the decision of the court.

At the trial in the superior court of Suffolk at May term 1859, the petitioner contended that the award was void for error in law apparent upon the statement of facts annexed to to it. But *Morton*, J. ruled that the award was a bar to this proceeding. The jury returned a verdict for the respondents, and the petitioner alleged exceptions.

B. R. Curtis & W. Whiting, for the petitioner, cited *Boston Water Power Co.* v. *Gray*, 6 Met. 168; *Ward* v. *American Bank*, 7 Met. 489, 490; *Fairchild* v. *Adams*, 11 Cush. 555; *Hayden* v. *Johnson*, 26 Verm. 768; *Nance* v. *Thompson*, 1 Sneed, 321; *Calvert* v. *Williams*, 9 Gill, 172.

B. F. Thomas & C. P. Judd, for the respondents, besides some of the cases cited in the opinion, cited *Gascoyne* v. *Edwards*, 1 Yo. & Jerv. 19; *Crofts* v. *Harris*, Carth. 187; *Goodman* v. *Sayers*, 2 Jac. & Walk. 259; *Anderson* v. *Fuller*, 4 M. & W. 470; *Wright Cromford Canal*, 1 Ad. & El. N. R. 98; *Barton* v. *Ranson*, 3 M. & W. 322; *Wilson* v. *King*, 2 Cr. & M. 689; *Burchell* v. *Marsh*, 17 How. 344; *Myers* v. *York & Cumberland Railroad*, 2 Curt. C. C. 28; *North Yarmouth* v. *Cumberland*, 6 Greenl. 21; *Smith* v. *Thorndike*, 8 Greenl. 119; *Walker* v. *Sanborn*, 8 Greenl. 288; *Tyler* v. *Dyer*, 13 Maine, 41; *Deane* v. *Coffin*, 17 Maine, 52; *Cushing* v. *Babcock*, 38 Maine, 452; *Jessiman* v. *Haverhill & Franconia Iron Manuf. Co.* 1 N. H. 68; *Pickering* v. *Pickering*, 19 N. H. 389; *Ennos* v. *Pratt*, 26 Verm. 630; *Armstrong* v. *Masten*, 11 Johns. 189; *Newland* v. *Douglass*, 2 Johns. 62; *Barlow* v. *Todd*, 3 Johns. 367; *Cranston* v.

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Kenny, 9 Johns. 212; *Brazil* v. *Isham*, 2 Kernan, 9; *Merritt* v. *Merritt*, 11 Ill. 565; *Gordon* v. *Mather*, 3 Jones Eq. 462; *Finley* v. *Finley*, 11 Missouri, 624; Kyd on Awards, 249; Russell on Arb. (3d ed.) 57, 502; 2 Parsons on Con. 215.

DEWEY, J.* The question before us is as to the conclusiveness of an award made by three arbitrators selected by the parties to estimate the damages occasioned by laying out and maintaining a railroad over the land of the petitioner, the submission being by bonds given by the respective parties to abide the award that might be made by said arbitrators, it being recited in the bonds of submission that "the award of such arbitrators, or of the major part of them, given in writing under their hands, to be final and binding upon the parties."

The submission is in the most general form, and of course leaving the arbitrators to decide upon the question submitted to them upon such principles of law or equity as they might adopt as the best adapted to the justice of the case and the rights of the parties; and being an arbitration by bonds, of course the parties did not contemplate its being returnable before any legal tribunal for supervision or acceptance, as would be the case under a rule of reference from the courts.

On the part of the petitioner, it is contended that this award is invalid, as being based upon erroneous legal principles, or, in other words, that the arbitrators erred in matter of law in determining the amount of damages claimed by the petitioner. On the other side, it is said that under the submission and award the rights of the parties are finally settled as to all questions of law or fact involved in the controversy.

No objection is taken to the award as not within the terms of the submission, or that the submission required them to determine all questions that might arise under the claim for damages as to the interest and right of the petitioner in the real estate affected by the laying out and maintaining of the railroad of the respondents.

* BIGELOW, C. J. did not sit in this case. DEWEY, J. sat in this case and those following until otherwise noted. MERRICK, J. did not sit for the rest of the term.

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What then are the principles of law applicable to such an award, and how far is it open for revision by a judicial tribunal? Upon this subject, it seems quite sufficient to examine and apply the doctrines held by this court, without attempting to review or reconcile all the various decisions found in the numerous reported cases. It is peculiarly the proper course on the present occasion, inasmuch as the same has so often been the subject of consideration, and so fully presented in the opinions of Chief Justice Parker in *Jones* v. *Boston Mill Corporation*, 6 Pick. 148, and Chief Justice Shaw in *Bigelow* v. *Newell*, 10 Pick. 348, *Boston Water Power Co.* v. *Gray*, 6 Met. 131, *Ward* v. *American Bank*, 7 Met. 486, and *Fairchild* v. *Adams*, 11 Cush. 549.

In the first of the above cases, *Jones* v. *Boston Mill Corporation*, it was announced as a rule of law, that where it manifestly appears by the submission that the parties intended to leave the whole matter, law and fact, to the decision of the arbitrators, the award is conclusive, although they have mistaken the law, unless the award itself refers the point to the consideration of the court.

In the cases above cited will be found fully stated the principle that arbitrators have authority to decide conclusively all questions of law necessary to the decision of the matter submitted to them, unless they are restricted by the terms of the submission, and that their mistakes, in adopting erroneous rules, are not a legal cause for avoiding their award, or, to state the principle in the precise language of the court in *Bigelow* v. *Newell*, 10 Pick. 355, "it is a well settled rule that if parties who select their own judges do authorize them to consider and decide all questions of law arising on the hearing of the subject matter, or in more general terms submit their respective rights depending upon considerations of law and fact, and the referees decide accordingly, such award is conclusive as well of the law as the fact."

The case before us falls fully and directly within the class of cases last above described. It was a submission in general terms of the rights of the parties, depending upon the considera-

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tion of questions of law and fact. It was a stronger case for the application of the rule, being a submission by bonds, and the award to take effect from its publication, and not returnable to any court for acceptance thereof.

Under the application of this well settled rule, had the case been strictly confined to the matter stated in the formal award declaring the determination and award of the arbitrators, concerning the matter submitted to them, we suppose there would be no question as to the finality of the same, and that this court would be precluded from the inquiry now sought to be made, namely, whether the arbitrators had decided correctly upon matters of law arising in the investigation of the subject submitted to them. The only possible ground for raising any question as to the conclusiveness of this award is that founded upon the supplemental paper accompanying the award, signed by the arbitrators, and in these words: "A statement of the facts and principles upon which the foregoing award is made is, at the request of the said Smith, hereto annexed, signed by the said arbitrators, and to be taken as a part of said award." The further inquiry is whether this instrument, signed by the arbitrators, brings the case within the class of cases in which the court have revised the doings of the arbitrators, and held the award invalid if found erroneous in its decisions upon matters of law arising in the case.

One of the familiar cases where such supervision is exercised is where the arbitrator by his award refers the question of law to the decision of the court, making his award in the alternative as the court may pronounce the law. This is very intelligible, and adapted to all cases where the arbitrator does not purpose to have his award final, and where the award is returnable to the courts of law. That is not the present case, however.

Another case stated in the authorities upon this subject, and that upon which this award is to be set aside, if at all, is this, "where it is manifest upon the award that the arbitrator intended to decide according to law, but has mistaken the law." This ground has been supposed to open awards where the

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report of the arbitrators has presented on its face the full grounds of the making the award for supervision; and many cases may be found of its recognition. This proposition assumes that the error is manifest on the award itself, and, as it seems to us, it must be taken with the qualification that the award so clearly indicates the purpose of the arbitrator to decide by the strict rules of law, that it justifies the judicial mind in supposing that the arbitrator would have made a different award, had he known that the judicial tribunals held a different view of the questions of law arising in the case from those entertained by himself.

In the case before us, it is denied on the part of the respondents that this supplement to the award can properly be taken as a part of the award for this purpose. The award, it is said, was complete and perfect without it. Had a statement precisely like this, so far as regards "the facts and principles upon which the award was made," been delivered to Mr. Smith at his request, to indicate to him the course taken by the arbitrators in coming to their result, such paper would furnish no sufficient ground for revising the award, and setting the same aside for error in law manifest on the award. *Ward* v. *American Bank*, 7 Met. 486. It is not then that the court has the means of knowing that the arbitrators here erred, as would be the fact in the case last supposed; but it is an essential element in the matter, that the arbitrators must have intended to furnish the means and the opportunity for correcting any errors in law they may have made. It is urged, however, that this supplement, thus executed at the request of Mr. Smith, was annexed to the award, and "to be taken as a part of the award," and this gives greater significance to the document, and requires a consideration of the case under that aspect.

Our cases are not without some precedents for this case, taking the view of the supplemental report most favorable for the petitioner as to its being properly before the court with the award. In *Bigelow* v. *Newell*, 10 Pick. 348, where there was a statement by referees of the grounds of their decision, returned to the court to which the award was returnable, the court held

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that it did not open the case for revision for errors in matter of law, the submission being general and unrestricted. In *Boston Water Power Co.* v. *Gray*, 6 Met. 131, though the award set forth upon some of the points the course of proceeding and reasons for the award, yet the court declined to open the question of the correctness of the principles upon which the arbitrators had found their award, being satisfied that the parties had submitted all the questions connected with the case to the arbitrators, as final judges. In *Fairchild* v. *Adams*, 11 Cush. 548, a very strong view is taken by the court of the conclusiveness that should attach to an award made by arbitrators acting under a general submission. That was a case of an award made under a rule of court and returnable to the court for its acceptance, and the award set forth fully the views of the referees, and grounds of their decision in matter of law. Although the court thought proper in that case to consider the report, it will be seen that the grounds for it are not the same as in the present case. It is said by the court in that case, that if it is manifest that the referees do not intend to submit the questions of law to the court, but merely to state the facts of the case and the grounds of their decision for the satisfaction of the parties, such a statement would not authorize the court to disturb the award. It was further stated that the only possible ground upon which a claim for a revision of the award can be maintained for errors in law was this, that if the arbitrators state the grounds of their award simply, and without expressing the contrary, it is to be presumed that they do mean to present those grounds to the court. 11 Cush. 555.

It is to be remembered that this presumption, thus spoken of as arising from the arbitrators making a statement to the court, was a presumption authorized to be made in a case not like the one before the court, but the case of an award founded on a submission by a rule of court and returnable to a court to enter judgment on the award. Now there are two considerations against the application of such a rule of presumption in the case at bar. First, the arbitrators say they make this statement "at the request of Mr. Smith." If this was not thus done for

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the satisfaction of one of the parties, that he might know upon what ground the award was made, why was it not annexed to the award, without this designation of the occasion for annexing. If it was originally part and parcel of the award, it would be found with it at all events, as well without as with the request of Mr. Smith. It would be a document for the benefit of both parties, and no such specification of one would have been made. In the second place, this presumption is in the present case fully rebutted by the fact that this was a submission *in pais*, making these arbitrators the highest tribunal to act upon the question. The award was not to be returned to any court. The case furnishes no ground for supposing that these arbitrators meant to say, "We think the award is right in point of law, but we submit that question to the court," as was suggested might be the case in *Fairchild* v. *Adams*.

Let us examine the present case by the test proposed by the counsel for the petitioner, as stated in three propositions, which in his view, if established by the evidence, would require the court to set aside this award, namely: 1st. If the arbitrators intended to decide according to law; 2d. If they have stated the law and the facts in their award, in order that it might appear whether they had executed that intent; 3d. If it appears that they have not executed that intention.

Now, as to the first, it might be asked, where is the evidence that they intended to decide according to the principles of law rather than equity and substantial justice between the parties? or where is the evidence that they intended to base their award upon any other legal opinions than their own?

But however that may be, the second proposition is the one more open to doubt. That proposition affirms that the arbitrators stated the law and facts in their award, that it might appear whether they had executed their intent to decide according to law. Do the facts in the case sustain that position? Does not the fact that the award was not made returnable to any court for revision or acceptance strongly negative any such inference as is proposed to be made? To whom was the report of the facts and law to go to for an appellate judgment?

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The award was by the terms of the bonds of submission to be performed at once if the respondents tendered performance on their part, and by the terms of the same bonds, "the award of the arbitrators was to be final, and binding on the parties." The arbitrators undoubtedly intended to give publicity to their reasons for the award they had made, holding themselves responsible as men of intelligence and learning in the matter submitted to them. But there must be something beyond this, to establish the position that they made this supplement to their award in order that it might appear whether they had decided according to law. It must appear that they made the statement for the purpose that their award might be inoperative, if it appeared that they had not decided according to law as held by judicial tribunals. For aught that appears, this board of arbitrators intended to make an award based upon their own views of the law and facts of the case, irrespectively of the law of the books. That they had under this submission a right to do so is unquestionable. The case was one to be determined upon a complicated state of facts and the law to be applied to them. We fail to perceive any indications of a purpose on the part of the arbitrators to state a case for revision or correction in matter of law, if they had erred respecting the same.

It may also be further remarked, that the questions of law in which the arbitrators are now alleged to have erred, if stated most favorably for the petitioners, were questions of such a character that it cannot be said to be a case of gross and plain erroneous mistake of law. Upon questions of law of a doubtful character, and where legal gentlemen might reasonably differ, the court would be slow to set aside an award for mistakes in law, in a case of general submission by bonds to abide the award, and that the same should be final. Kyd on Awards, 351. *Fairchild* v. *Adams*, above cited.

Exceptions overruled.

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HIRAM WHITMAN & another *vs.* BOSTON AND MAINE RAILROAD.

A petition to the mayor and aldermen of Boston for the assessment of damages was filed by two owners of land over which a railroad had been located, and an order of notice issued thereon. Some years afterwards, a new petition was filed by the administrator of one of the petitioners and the other petitioner, stating that the proceedings upon the first petition had been restrained by a suit in equity, since dismissed, and praying that such proceedings be had in the premises as were prayed for in the first petition. *Held*, that an adjudication by the mayor and aldermen upon the last petition was, in effect, an adjudication upon the first, and authorized the petitioner to apply to the superior court for a jury.

PETITION to the superior court of Suffolk, by Hiram Whitman, administrator of the estate of Joseph H. Bartlett, deceased, and Otis Minott, for a jury to assess the damages caused by the location of the respondents' road over land belonging to Bartlett and Minott, in Boston.

At the trial in that court at May term 1859, the petitioners produced the record of the mayor and aldermen of Boston, which showed the following proceedings: A petition by Bartlett and Minott, dated June 8th 1847, praying for the assessment of damages for the taking of their land by the respondents, under the Rev. Sts. *c.* 39, § 60, and an order of notice thereon: Also a petition by Whitman and Minott, dated March 30th 1858, reciting the previous petition; and alleging that, on the 13th of July 1847 the Boston and Maine Railroad filed a bill in equity in this court, praying, among other things, that the petitioners might be restrained from prosecuting their claim before the mayor and aldermen until the termination of that suit, and that in consequence thereof proceedings on that petition were stayed; that on the 29th of March 1858 the bill was dismissed; that in 1853 Bartlett died, intestate, and Whitman was appointed administrator of his estate; and praying that such proceedings be had in the premises as were prayed for in the first petition. Upon the second petition, the mayor and aldermen assessed nominal damages.

The respondents objected that the record of the mayor and aldermen showed no such adjudication upon the petition of Bartlett and Minott as authorized the petition to the superior

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court; and *Morton*, J. so ruled, and dismissed the petition. The petitioners alleged exceptions.

J. G. Abbott & H. C. Hutchins, for the petitioners.

B. F. Thomas & C. P. Judd, for the respondents.

BIGELOW, C. J. We can see no essential informality or irregularity in these proceedings. The manifest purpose of the second petition was to give the history of the proceedings on the first petition, the reasons for the delay in acting upon it, to state the material events which had occurred during its pendency before the mayor and aldermen, and to ask that the prayer thereof might be granted. It was not a new and original petition, but in effect nothing more than a method adopted to revive, bring forward and renew the original petition, to suggest the death of one of the petitioners, to make his administrator a party to it, and to obtain a legal adjudication thereon. Viewed in this light, the whole was only one continuous legal proceeding; and the adjudication of the mayor and aldermen, construed, as it ought to be, in connection with all which preceded it on the same subject, forming the legal record of the case, was a determination on the matter embraced in the original petition. By a fair interpretation, the second petition was only incidental and supplemental to the first; and in acting upon it, the mayor and aldermen necessarily adjudicated upon the original petition, which was referred to and included within the second. *Exceptions sustained.*

JOHN H. BLAKE *vs.* BENJAMIN F. BAYLEY.

A party whose counsel is present and silent at the return and acceptance of a verdict cannot afterwards object to it upon the ground that the court had been adjourned before the jury came in.

The records of a corporation, showing the election at their annual meeting of a certain person as a director, and his presence and making motions at a subsequent meeting of the directors, are not conclusive evidence against him that he accepted the office.

ACTION OF TORT against a deputy sheriff for levying an execution against the New England Mining Company, a corpora-

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tion established in this commonwealth, upon property of the plaintiff as a director thereof.

At the trial in the superior court of Suffolk at March term 1859, before *Nash*, J., all the other facts were agreed by the parties, and by agreement the single issue submitted to the jury was whether the plaintiff was a director of the corporation in 1857.

The defendant put in evidence the records of the corporation, verified by the testimony of their clerk, by which it appeared that at its annual meeting on the 14th of January 1857 the plaintiff was duly elected a director for the ensuing year; and that at a regular meeting of the directors on the 12th of February 1857 he was present, and made two motions, which were put to vote and carried. The plaintiff testified that he was a stockholder in the corporation, but was not present at that annual meeting; that soon afterwards he received a written notice of his election, to which he thought, but was not sure, that he replied; that he shortly afterwards called on the president, and told him that he should not accept the office of director; that he attended said directors' meeting at the special request of the president, to advise with them as to the affairs of the corporation, and only made informal suggestions and no formal motion, but expressly said at the meeting that he was not a director and should not accept the office. It was not contended that the records were fraudulently made.

The defendant objected to this testimony, upon the ground that the records, having been made by the sworn clerk of the corporation and agent of the plaintiff as one of the stockholders, were the only competent evidence of the proceedings at the directors' meeting, and could not be contradicted and controlled by him. The judge ruled that the records were *prima facie*, but not conclusive evidence; that the plaintiff's testimony was admissible; that he was not constituted a director by the election merely, unless he had accepted the office; and whether he had accepted it was for the jury to determine upon all the evidence. To this ruling the defendant alleged exceptions, which were allowed by the judge.

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The bill of exceptions, as allowed, then stated the following proceedings: At the usual hour of adjournment in the afternoon, the jury were out; and the judge left the bench, without having given any verbal order for the adjournment and before the proclamation therefor was completed, and without having given any order as to the jury who were out, and passed into the adjacent lobby, leaving the intervening doors open. In a moment or two the judge came back into the court room, while the clerk and other officers of the court remained in their usual places, and, in the presence of the defendant's counsel, recalled and vacated any adjournment that had been made. The jury then came in, and the judge directed the verdict to be taken, the defendant's counsel being present and interposing no objection, and the jury rendered and affirmed their verdict that the plaintiff was not a director. Whereupon the court adjourned.

The defendant afterwards moved that the verdict be set aside and a new trial granted, because the verdict was received by the judge and recorded by the clerk after the court had adjourned and while it was not in session. But the judge overruled the motion, "on the ground that courts have a right to recall and vacate proclamations and adjournments as prematurely and inconsiderately made, for the necessary or reasonable transaction of business, so long as no one is thereby prejudiced; and that, under the above circumstances, it was impossible that the defendant was prejudiced; and that there was not, in fact, a substantial adjournment; and that if there was, the presence of the defendant's counsel was tantamount to an assent and a waiver of error." The judge, the defendant objecting and excepting, ordered judgment on the verdict for the plaintiff, and the defendant alleged exceptions.

It was alleged in the bill of exceptions as originally tendered by the defendant, (though not as allowed by the judge,) and was proved before a commissioner appointed by this court upon the defendant's petition to establish the truth of his exceptions, by the concurrent testimony of the clerk of the court, the officer who made the proclamation of adjournment, and the defendant's counsel, (the plaintiff's counsel not having been present,)

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that a proclamation adjourning the court until the next day had been made in the usual manner by order of the judge before he left the bench and while the jury were out.

A. A. Ranney, for the defendant.

H. F. Smith, for the plaintiff.

METCALF, J. The defendant's counsel, being present in the court room when the verdict was returned, and making no objection thereto, waived the irregularity (if any) and the objection is not open to the defendant.

The evidence which was objected to by the defendant at the trial was rightly received.

Exceptions overruled, and judgment affirmed.

PRESIDENT, DIRECTORS AND COMPANY OF THE FANEUIL HALL BANK *vs.* PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF BRIGHTON.

A draft made by a bank within upon a bank without the Commonwealth for more than the sum of one hundred dollars, contrary to the Rev. Sts. c. 36, §§ 57, 62, is not void; but an innocent holder, after due demand upon the drawees and the bank, may recover the amount thereof, with interest at the rate of two per cent. a month, under §§ 60 - 63.

A bank is responsible for the acts of its cashier, in making a draft upon another bank for the payment of money at a future day certain, contrary to the Rev. Sts. c. 36, § 57, although fraudulently drawn by him, for the purpose of concealing his embezzlement of the funds of the bank.

ACTION OF CONTRACT upon two drafts, for $10,000 each, drawn by Robert N. Woodworth, cashier of the Bank of Brighton, upon the Fulton Bank of New York, the first dated August 25th 1858, payable "on the 28th day of September, graceless," to the order of J. P. Squire & Co., and by them indorsed; and the second dated September 7th 1858, payable to the plaintiffs on the 7th of October; with a third count, for the sum of $20,000 had and received to the plaintiffs' use. The parties submitted the case to the court upon the following statement of facts:

"The two drafts declared upon were made by Woodworth,

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cashier of the defendant bank, and were duly presented for payment at the Fulton Bank, and protested for nonpayment. They were duly demanded at the Bank of Brighton, on the days alleged in the plaintiffs' declaration, and payment refused. The first draft was passed to J. P. Squire & Co., who indorsed the same to the plaintiffs, and the plaintiffs discounted it for its full value, which was paid to Squire & Co., on the faith of the paper. The second draft was sold by Woodworth to the plaintiffs, who discounted it in like manner. Woodworth had for some years carried on a system of drawing and discounting with different persons similar drafts on time on the Fulton Bank, for the purpose of concealing embezzlements, commenced four or five years previously.

"When Woodworth gave Squire & Co. the first draft declared on, they got it discounted at the Faneuil Hall Bank, paying the discount of $50; and the amount, $10,000, was passed to their credit. Squire & Co., on the same day, gave Woodworth two checks on the Faneuil Hall Bank, one for $6000 and the other for $4000, and Woodworth paid them the discount of $50, in cash. Woodworth then sent Squire & Co.'s clerk with the $6000 check to the Faneuil Hall Bank, who received the bills therefor, and handed them to Woodworth, who forthwith deposited them in the Suffolk Bank, (with which the Bank of Brighton kept an account in the usual manner,) to the credit of the Bank of Brighton, to help make good the Bank of Brighton's account at the Suffolk Bank. This account at the Suffolk Bank had been drawn down by Woodworth in continuing his plan, by which he concealed his embezzlements of the funds of the Bank of Brighton, which embezzlement, to the extent of about $44,500, had existed for nearly two years previous.

"In the course of the business of the Bank of Brighton, it was the custom of the teller to deliver at times Bank of Brighton bills to the cashier, for the purpose of being used by the cashier in the business of the bank, and to receive as a voucher therefor the cashier's memorandum check. These checks were afterwards taken up by the cashier's delivering therefor to the teller

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bills, or other funds, which were considered cash. The $4000, above mentioned, were made use of by him to make good in part a check thus given to the teller.

"The proceeds of the second draft were received by Woodworth in the bills of the Faneuil Hall Bank, of which $9000 were deposited on the same day to the credit of the Bank of Brighton at the Suffolk Bank, for the same purpose as stated with regard to the $6000 on the first draft. A part of the remaining $1000 was turned into the Bank of Brighton in the same manner as the $4000, before mentioned, and the balance was unaccounted for.

"The plaintiffs had no knowledge of any of the frauds of Woodworth, or of anything irregular in the paper, (unless such irregularity appears on its face,) and took these two drafts in the regular course of their banking business.

"These two drafts were not made with the actual knowledge of any of the defendants' officers, excepting Woodworth; but the defendant bank had before, with the knowledge of its directors, in their regular business, made and allowed in their settlement with the Fulton Bank similar drafts, some of which had been discounted at the Faneuil Hall Bank, and paid at maturity at the Fulton Bank; and the defence that Woodworth had no authority to make and have discounted such drafts is waived — if the directors or other officers could by acquiescence, or in any other manner, without direct vote of the board of directors, give such authority.

"The defendants rely upon the defence that the drafts were illegal under the statutes of this commonwealth, and that no officer of the bank could lawfully make them, and that they are therefore void.

"If, upon the foregoing facts, or such thereof as are admissible in evidence, the drafts are not void in the hands of the plaintiffs; or the officers and directors of the bank could authorize, without a direct vote of the board of directors, the issuing thereof, judgment shall be rendered for the amount of both, or either, as the court shall determine, with such interest thereon as the law allows; if the court shall think that the

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plaintiffs are not entitled to recover upon the counts upon the drafts, or either of them, but are entitled to recover upon the money count, judgment is to be rendered thereon for such amount and interest as the court shall order; otherwise, for the defendants."

B. R. Curtis & C. A. Welch, for the plaintiffs, cited Rev. Sts. c. 36, §§ 57, 61–63; Story on Bills, § 13; *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. 488; *White* v. *Franklin Bank*, 22 Pick. 184, 186, 188; *Manufacturers & Mechanics' Bank* v. *Gore*, 15 Mass. 80; *Mason* v. *Waite*, 17 Mass. 563; *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532; *Glyn* v. *Baker*, 13 East, 509; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490.

B. F. Thomas & H. F. Durant, for the defendants, cited also *Sts.* 1809, c. 38, § 1; 1816, c. 91, §§ 1, 2; 1828, c. 96, § 25; c. 97, § 2; 1834, c. 203, §§ 1, 2; *Holman* v. *Johnson*, Cowp. 343; *Mills* v. *Western Bank*, 10 Cush. 22; *Western Bank* v. *Mills*, 7 Cush. 539; *Mills* v. *Rice*, 6 Gray, 458; *Cone* v. *Baldwin*, 12 Pick. 545; *Thompson* v. *Hale*, 6 Pick. 262; *Knapp* v. *Lee*, 3 Pick. 452; *Merriam* v. *Granite Bank*, 8 Gray, 254; *Gill* v. *Cubitt*, 3 B. & C. 466.

Chapman, J. The plaintiffs seek to recover of the defendants the amount of the two drafts declared upon; the plaintiffs being indorsees for value, the defendants by their cashier being the drawers, and the drafts having been protested for nonpayment. The defendants say that the drafts, being payable on time, were drawn by their cashier in violation of the Rev. Sts. c. 36, § 57, and are therefore void, and that even a holder for value cannot enforce their payment. This section is in the following words: "No bank shall make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the Commonwealth, or of any institution for savings incorporated under the authority of the Commonwealth, and excepting also, that all debts due to any bank from any other bank, including bills of the bank so indebted, may lawfully draw interest." This section does not attach any penalty to the offence; and if

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the defendants' position is correct, that it is to be construed by itself, all the penal consequences of its violation by a bank will fall upon the holders of such notes, bills, checks, drafts, acceptances, &c., as the bank may choose to issue, payable at a future day certain, or with interest; because such notes, &c., are void and cannot be collected, even in the hands of holders for value; while the bank may keep the money it has obtained for its worthless paper, and be free from any penalty. Upon such a construction of the act, any bank might issue as many bills as it could procure to be put into circulation, payable at a future day certain, or with interest, and be exempt not only from paying them, but exempt from any punishment for issuing them. It might be subject to a forfeiture of its charter; but it could well afford this, after one large speculation of such a character. It would require a very plain and unequivocal expression of legislative intent to bring us to such a result. We are therefore induced to look further into this chapter; to see whether some of the subsequent sections have not some connection with this. We discern some reason for this course in the fact that in the legislation that existed on this subject when the Revised Statutes were passed, and also in the report of the commissioners, the substance of this and several subsequent sections were contained in a single long section. The legislature adopted the policy of separating the provision of one long section into several short ones, and they also made some changes in the existing law, showing that they revised the whole system.

Proceeding then to section 58, we find a restriction on bank loans, and in the same section a penalty on the bank of five hundred dollars for violating the restriction. But in section 59, the taking of a greater rate of interest than six per cent. is forbidden, yet the section contains no penalty for the offence. The penalty is contained in section 60. We perceive therefore that the legislature did not adopt any uniform rule as to the insertion of the penalty in the same section that declared the offence.

We then come to section 61, which is as follows: "Every

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bank, which shall issue any bill, note, check, or draft, redeemable in any other manner than by payment in specie on demand, or payable at any place other than the place where such bank is by law established and kept, shall be liable to pay the same in specie to the holder thereof on demand at said bank, without a previous demand at the place where the same is, on the face of such bill, note, check, or draft, made payable; and if the bank which issued the same shall neglect or refuse so to pay on demand, such bank shall be liable to pay to the holder thereof two per cent. a month damages, as before provided in this chapter." But to "issue any bill, note, check, or draft, redeemable in any other manner than by payment in specie on demand," is to violate section 57. This section, then, relates to an offence declared by that. And the penalty is not a pecuniary fine; the nature of the offence enables the legislature to check it in a much better way than by fine. It gives a legislative construction to the bill, note, check, or draft, illegally issued, by which, instead of being void in the hands of a holder for value, it is payable on demand in specie at the bank, and if not so paid, subjects the bank to two per cent. a month damages. Instead of punishing the holder by making the paper void in his hands, and enabling the bank to keep the money it has wrongfully obtained, it makes the offence itself impossible, and destroys all motive to attempt its commission. It is the most effective of all legislation, in cases where it can be applied, and makes a fine or forfeiture unnecessary. It places such paper on the same ground on which bank bills are placed by section 29. And as between a bank and parties who may come into possession of its negotiable paper for value, it is manifestly just.

Section 62 relates to the same subject, and its exclusive object is to modify and limit section 61. It provides that section 61 shall not extend to any check or draft drawn by the president or cashier of any bank within this state, on any other bank, within or without the State, for any sum exceeding one hundred dollars; but these two classes of paper, namely, checks and drafts for more than one hundred dollars, drawn by one bank upon another, and redeemable in some other manner than

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by payment in specie on demand, shall first be presented at the bank on which the same are drawn. Then follows a provision obviously intended to operate as a restraint upon making such checks or drafts without providing for their payment; namely, that the holder may recover the amount with two per cent. a month damages from the bank that issued the paper, if the bank after the protest neglects to pay it on demand.

Now the drafts in suit were drawn upon another bank, the Fulton Bank of New York, and were for more than one hundred dollars. It was necessary, therefore, to present them at the Fulton Bank, and, as they were not paid there, the 62d section expressly makes the defendants liable to pay them with two per cent. a month damages from the time when the defendants, after the protest, refused to pay the same on presentment at their banking-house.

The construction thus given to the 61st and 62d sections operates as an important modification of section 57. It will be seen that sections 61 and 62 do not touch the subject of notes, &c., payable with interest — which is one of the classes mentioned in section 57 — and the whole legislation on this subject lacks clearness and accuracy. But the drafts in suit are not made payable with interest, and thus they come within the provisions of all the three sections.

It is impossible thus to give this matter proper consideration, without adverting to section 63, which is as follows: "Nothing contained in this chapter shall restrain any bank from drawing any check or draft for any balance due to said bank."

Therefore section 57 does not restrain the defendants from drawing drafts upon the Fulton Bank for any balance that may be due them. But a holder of a draft for value is not bound to know that the draft is not for a balance due, and payable at the time when the draft is made payable. If section 57 was designed to prohibit the making of such drafts on time, it does not clearly express the prohibition; for one of its exceptions is that all debts due to any bank from any other bank, including bills of the bank so indebted, may lawfully draw interest. But if such indebtedness with interest may exist, it

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must exist by virtue of a contract, express or implied; and if a contract is authorized, it must be incident to it, that it may fix the time for which the debt shall exist on interest, and when it shall become payable. This analysis of the statute may leave its provisions less stringent than they have been commonly supposed to be, and some amendment may be necessary. But the inference from the view above taken is this: that if the defendants would have a right under sections 57 and 63, to make such drafts as those in suit for a balance due them, and if a holder for value has a right, as against the defendants, to regard the drafts as drawn for balance, then the defence must fail. There can be no doubt that the plaintiffs as indorsees had a right to regard the drafts as drawn against funds in the Fulton Bank sufficient to meet them; and that they had a right to make every presumption which the law made possible in favor of the legality of the drafts. And as the 57th section does not prohibit one bank from owing another bank a debt payable on time with interest, and as a draft for the amount of such a debt may be made before it is payable, the draft in such a case is permitted by the statute to be drawn payable at a future day certain for the amount of such debt. And if the defendants were guilty of an offence in making a draft, when no balance was due, the plaintiffs are not parties to it, nor implicated in it.

The views which the court have taken of the statute are not free from difficulty; for the statute is in some degree obscure, partly because the phraseology relating to the same matters differs in different sections, and partly because the legislature do not appear to have had in view, in prescribing penalties, all the various cases that would arise under the prohibitions of the statute.

There can be no doubt that the defendants are responsible for the act of their cashier, it being within the scope of his authority to make their drafts, and if he defrauded them, they must bear the loss.

Judgment must be rendered for the plaintiffs, with interest at the rate of two per cent. a month from the time when the drafts

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were presented to the defendants for payment after the protest, the defendants having had no funds in the Fulton Bank. The entry of judgment will be as of December 3d 1860, since which time the case has been delayed by the court for consideration. Beyond that time the penalty ought not to run.

Judgment for the plaintiffs accordingly.

LUTHER CRANE & others *vs.* WILLIAM ADAMS.

Under the *St.* of 1856, *c.* 38, § 2, a suit in equity to enforce the execution of a trust might be begun by a bill inserted in a writ of attachment, according to the Rev. Sts. *c.* 90, § 117.

BILL IN EQUITY to enforce the execution of a trust, inserted, according to the Rev. Sts. *c.* 90, § 117, in a writ of attachment, dated October 26th 1858.

The defendant demurred to the bill, because the suit was commenced by a writ of attachment with a bill of complaint inserted therein, instead of a declaration in an action of contract or tort under the *St.* of 1853, *c.* 371. The demurrer was overruled, and the defendant ordered to answer the bill; and he appealed to the full court.

D. E. Ware, for the defendant, cited *Irvin* v. *Gregory*, 13 Gray, 215; Rev. Sts. *c.* 90, § 117; *Sts.* 1853, *c.* 371; 1855, *c.* 194, §§ 2, 5; 1856, *c.* 38, §§ 2, 3; Commissioners' Report on Gen. Sts. *c.* 129, § 2.

U. H. Crocker, for the plaintiffs, was stopped by the court.

BIGELOW, C. J. The purpose of the *St.* of 1856, *c.* 38, § 2, was to remove doubts which had grown up as to the construction of previous statutes concerning the mode of commencing suits in equity. It clearly provided two modes; one by a bill, in the usual mode adopted in courts of chancery, to be filed in the office of the clerk, and on which a subpœna was to issue; the other by a writ of attachment, that is, by inserting the bill of complaint in a writ, and serving it on the defendant by an attachment of his property, in the mode heretofore prac-

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tised in this state, under the Rev. Sts. *c.* 90, § 117. It could not have been intended to apply to those cases included in the *St.* of 1853, *c.* 371, because they, being brought as actions at law, could be commenced by writ of attachment, without any express provision to that effect. As to them, the statute was useless. It could therefore have been intended only for cases where the suit was brought by a bill; and we know of no mode in which a writ of attachment can be used in a suit in equity brought by a bill, except by inserting the bill in the writ. The statute was intended only to prescribe the mode in which a suit might be commenced, and not to change the nature of the suit or the form of pleading. *Demurrer overruled.*

CHARLES S. HOMER *vs.* ALANSON ABBE & others.

No hearing can be had upon a bill in equity, founded upon articles of copartnership, and naming all the partners as defendants, if the return upon the subpœna does not show that all the defendants residing within the Commonwealth have been duly summoned to answer the bill, although those defendants who have been summoned have appeared and demurred thereto.

BILL IN EQUITY to enforce agreements contained in articles of association and copartnership between the plaintiff and the defendants under the name of the Fremont Mining Association. The defendant Abbe demurred to the bill, among other reasons, because the plaintiff had not caused all the persons named in the bill as defendants and partners in the transaction, and residing within the Commonwealth, to be duly summoned to answer the bill. *Hoar*, J. sustained the demurrer, subject to the opinion of the full court.

F. W. Sawyer, for the defendant Abbe. The failure to make all the partners residing within the jurisdiction parties to the bill, and to summon them in, is good cause of demurrer. *Palk* v. *Clinton*, 12 Ves. 58. Story Eq. Pl. § 76, & note.

H. M. Parker, for the plaintiff. It was not necessary to summon in all the copartners residing in the Commonwealth. It

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was enough to name them in the bill, at least until their non-joinder was duly pleaded. Adams on Eq. 319 - 322. Story Eq. Pl. §§ 77 - 80. *Stevenson* v. *Austin*, 3 Met. 480, 481. *Dana* v. *Valentine*, 5 Met. 13. *Crease* v. *Babcock*, 10 Met. 529. Rev. Sts. *c.* 92, § 12; *c.* 100, §§ 1 - 3, 6.

Bigelow, C. J. This case is in no condition to be heard on the demurrer. On inspection of the subpœna, it appears that the plaintiff has caused three only of the persons named by him as defendants in the suit to be summoned in to answer to the bill. As to the other defendants, whom he has joined in the suit, and who are necessary parties to the bill, he has omitted to take out the usual summons for their appearance. It is clearly his duty to proceed and bring the proposed defendants, who, upon his own allegations, are proper and necessary parties, before the court. Until he does so, he cannot ask that those whom he has summoned should be called to a hearing of the merits of the bill, or be compelled to have their rights and interests involved in the suit examined or adjudged. One of the essential principles of chancery jurisdiction is, that all persons interested in the subject or object of a suit should be made parties to the bill, and have opportunity of being heard. Otherwise, it would be impossible to do complete justice, or to decide on their respective rights definitively, or safely to adjudge on the matters properly included in the bill. 1 Dan. Ch. Pract. 240, 489. In this respect, a suit in equity differs materially from an action at law. In the latter, only those are made parties who are essential to the assertion of a right, or the redressing of a wrong. In the former, all are joined who have mutual rights and interests in the subject matter of a suit, so that modifications of their mutual rights may be made, their reciprocal duties and obligations adjusted, as well among the parties adverse as those who have common interests, and the whole subject of controversy finally adjudicated among them. It is only where all the parties are before the court, that the whole case can be brought out, and the conflicting interests, as shown by the pleadings, can be fully understood and adjudicated. The plaintiff must therefore make parties to the bill, not only those who

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have a common right or interest with himself, but also those who are adversely interested, and who have mutual rights to adjust, growing out of the claim or demand which he seeks to enforce by his bill. Such being the rule, it is clear that the plaintiff cannot proceed with his bill as the case now stands. It would be of no avail to join parties in a suit, unless they were summoned in to answer or plead. The rights of those who are summoned cannot be ascertained or adjudicated in the absence of others who are essential parties. The omission to summon them is as fatal to the further prosecution of the suit as an omission to join them.

It is true that the defendants who have been summoned have not taken advantage of this omission in the proper form. A demurrer lies only to that which is apparent on the face of the bill. This defect is shown only by an inspection of the return of the officer upon the subpœna. The proper mode of bringing it before the court would seem to be by a motion to dismiss, for want of due prosecution. But the objection has not been waived, and as it is of a nature to prevent the cause from being properly heard, so as to enable the court to enter a suitable decree, the court of its own motion will state the objection, and refuse to proceed further. Story Eq. Pl. § 75. Unless, therefore, the plaintiff causes all the defendants named in his bill, who are within the jurisdiction of the court, to be duly summoned without delay, an order will be entered, directing the

Bill to be dismissed.

LAURA KEENE *vs.* MOSES KIMBALL.

The representation of a dramatic work, which the proprietor has no copyright of, and has previously caused to be represented and exhibited for money, is no violation of any right of property, although made without license of the proprietor; and, if not shown to have been in violation of any contract or trust, cannot be restrained by injunction.

BILL IN EQUITY, alleging that the plaintiff was and long had been the lessee and manager of a place of amusement in the

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city of New York, known as Laura Keene's Theatre, and engaged in the business of presenting dramatic entertainments therein, and the defendant was the proprietor and manager of a similar place of amusement known as the Boston Museum, and engaged in the like business in Boston; that in November 1858 the plaintiff, for a valuable consideration, purchased from Tom Taylor of London in England, the author thereof, a certain comedy or dramatic composition, entitled Our American Cousin, and took from him an absolute bill of sale and assignment of the comedy and the manuscript thereof, and became and now was the sole and absolute owner of the comedy and manuscript, and of all the rights, privileges, benefits and profits in any way connected with and arising out of the same; that Taylor was a dramatic author of great celebrity, and his works had a great value and popularity, and the plaintiff was induced to purchase the comedy from him, by reason of his celebrity as a dramatic author, and of its own intrinsic value and merits, and of the profits and benefits which would accrue to her from having the sole ownership of and right to represent this comedy, and from the sale of rights to represent the same; that the comedy, under an agreement with Taylor, was first produced at her theatre, and had continued to be there represented nightly for five months, with remarkable success; that the comedy was of very great value to her, and that such value chiefly consisted in having the exclusive use and possession of the comedy and the manuscript thereof, and the sole right and privilege of representing, and of selling the right and privilege to represent and enact the same; that the unauthorized use or representation thereof by other parties and at other theatres greatly injured the plaintiff, depreciated the value of her property in the same, and irreparably injured her rights therein; that the defendant, well knowing, or having cause to know, that the plaintiff was the sole proprietor of the comedy, that it was first produced at her theatre, that she acquired it by the payment of a large sum to the author, that she produced it at her theatre at great cost and expense, that its popularity had been greatly enhanced and increased by the skill and care with which it had been so pro-

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duced and by her personal labor and attention, and being well aware of its value to her, and well knowing that its value chiefly consisted in the sole and exclusive use and enjoyment of the same, and of the right of representing and enacting it, and that all the benefit and profit to be derived from the comedy and the public enactment thereof belonged to her, and after being warned to desist from performing the comedy in violation of her rights, did, in wilful disregard and violation thereof, openly produce and publicly and repeatedly represent and enact the same comedy at the Boston Museum, and still continued and threatened to continue to represent and enact the same and to advertise it for future representations; that the comedy, as produced at the Boston Museum, was produced in palpable imitation of the manner in which it was produced at the plaintiff's theatre, and that the defendant had sent his artists, or some one or more of them, or some person whom he engaged to instruct them in the proper manner of performing the comedy, to witness its representation at the plaintiff's theatre, in order that that representation might be copied by the artists in said representation at the Boston Museum; that this representation was wholly unauthorized by the plaintiff, without her consent or approval, and in gross and utter disregard and violation of her rights; that the plaintiff had sustained great injury and damage by the representations heretofore given by the defendant, and apprehended that he would continue such unauthorized representations, and would irreparably injure her, depreciate the value of her property in the comedy, and deprive her of large gains and profits which would otherwise accrue to her from the representation of the comedy and from selling to others the right to represent the same; that before it was first produced by the plaintiff as aforesaid, the comedy had never been publicly enacted or represented, and had not then or ever been published or dedicated to the public at any time or in any manner, nor had she done any act relinquishing her exclusive right thereto; that she was advised that the comedy, never having been published, was not within the purview of the statutes of copyright; and that except in equity the plaintiff was remediless.

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The bill prayed for a discovery and account, an injunction, damages, and further relief. The defendant filed a general demurrer, and the case was thereon reserved by *Hoar*, J. for the decision of the full court.

G. H. Preston & D. P. Kimball, for the defendant.

W. D. Booth (of New York) *& T. W. Clarke*, for the plaintiff, cited *Macklin* v. *Richardson*, Ambl. 694; *Coleman* v. *Wathen*, 5 T. R. 245; *Murray* v. *Elliston*, 5 B. & Ald. 657; *Morris* v. *Kelly*, 1 Jac. & Walk. 481; *Storace* v. *Longman*, 2 Campb. 27, note; *Roberts* v. *Myers*, 23 Law Reporter, 396; 16 Merlin, Rep. Jur. tit. Spectacle; *Abernethy* v. *Hutchinson*, 1 Hall & Twells, 28; *Southey* v. *Sherwood*, 2 Meriv. 435; Eden on Injunctions, 190; Burke on Copyright, 42; Curtis on Copyright, 65, 75, 82, 92, 103, 210, 300; *Wheaton* v. *Peters*, 8 Pet. 591; *Bartlette* v. *Crittenden*, 4 McLean, 300; *Folsom* v. *Marsh*, 2 Story R. 100; *Woolsey* v. *Judd*, 4 Duer, 385, 386; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; *Albert* v. *Strange*, 1 Macn. & Gord. 25; *Queensberry* v. *Shebbeare*, 2 Eden, 329; *Thomson* v. *Stanhope*, Ambl. 737; *Millar* v. *Taylor*, 4 Bur. 2335; *Donaldsons* v. *Becket*, 4 Bur. 2408; *St.* 1782, *c.* 58; U. S. St. 1856, *c.* 169.

Hoar, J. The argument for the plaintiff has limited the range of inquiry upon her right to maintain this bill within a very narrow compass. It is expressly admitted that she has no copyright, and can have none, in the play in question, and that nothing has been done by the defendant, which is a violation of the general statute of copyright. Nor does the plaintiff profess to show herself entitled to any protection under the U. S. St. of 1856, *c.* 169, known as the dramatic copyright act. She "rests her case solely upon her common law right of property in a literary production." What this common law right is, and whether the case made by the bill shows a violation of it, are the questions for decision by the court upon the demurrer.

Notwithstanding the ingenious and interesting argument for the defendant, derived from the principles and ideas of the Puritan founders of the Commonwealth, we can entertain no doubt that a dramatic composition is equally under the protection of law with any other literary work. Courts will not in-

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terfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production; but the particular application once made of this rule of the common law, in conformity with the peculiar opinions, sentiments or prejudices of one generation of men, will not control its application in a state of society where different views prevail. If our ancestors prohibited all scenic exhibitions, it was because they regarded them as immoral and pernicious. If we do not so regard them, the reason ceasing, the rule ceases with it.

Treating a dramatic work, therefore, as unquestionably the subject of a right of property, we find some principles very clearly settled by a long series of English and American decisions, which have been recognized by the counsel on both sides as lying at the foundation of this discussion.

An author has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which equity will protect his assignee as well as himself. This property continues until, by publication, a right to its use has been conferred upon or dedicated to the public.

The representation of a dramatic work upon the stage is not a publication which will deprive the author or his assignee of this right of property.

While the performance of a play is not a publication which will prevent its proprietors from obtaining a copyright, or interfere with his right to resist its unauthorized publication by another, it has been settled that a play, once published by its author, may be represented on the stage by any person, without infringement upon the author's rights. This is still the rule of law, except in the cases provided for in England by the *St.* of 3 & 4 W. 4, c. 15, and subsequently by the *St.* of 5 & 6 Vict. 45; and in the United States by the U. S. St. of 1856, *c.* 169. And no case has been cited, nor are we aware that any exists, in England or America, in which the representation of a play has been restrained by injunction, where no copyright had been acquired, and where the proprietor had permitted its public representation for money, except the case of *Morris* v. *Kelly*, 1 Jac. & Walk. 481. That case was heard *ex parte* by Lord Eldon, and

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the report does not show the grounds upon which the injunction was asked or granted. Unless it proceeded upon an allegation of the use of a surreptitious copy of the work, it seems to be impossible to reconcile it with the earlier case of *Coleman* v. *Wathen*, 5 T. R. 245; or with the subsequent decision in *Murray* v. *Elliston*, 5 B. & Ald. 657. In both of these cases the plaintiff was the owner of a copyright of the play, and yet its representation upon the stage was held to be no violation of his rights.

The precise question which the case at bar presents has never been determined, so far as we are aware, in any reported case. But it has been discussed with great learning and ability in a recent case in the circuit court of the United States for the Eastern District of Pennsylvania, in which the opinion was given by Judge Cadwalader. *Keene* v. *Wheatley*, 9 Amer. Law Reg. 33. The doctrine there stated, and which seems to us supported by the reasonings and analogies derived from the whole current of authorities, is briefly this: The sole proprietorship of an author's manuscript, and of its incorporeal contents wherever copies exist, is, independently of legislation, in himself and his assigns until he publishes it. An unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public, except so far as protection is continued by the statutes of copyright. But there may be a limited publication, by communication of the contents of the work by reading, representation, or restricted private circulation, which will not abridge the right of the author to the control of his work, any farther than necessarily results from the nature and extent of this limited use which he has made, or allowed to be made of it. And, in the absence of legislation, when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any modes in which his publication may enable them to republish; so that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republi-

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cation by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience. In other words, the public acquire a right to the extent of the dedication, whether complete or partial, which the proprietor has made of it to the public.

These principles sustain the demurrer to the plaintiff's bill. She has publicly represented the play, Our American Cousin, before audiences consisting of all persons who chose to pay the price charged for admission to her theatre. She has employed actors to commit the various parts to memory; and unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned, before different audiences, and in various places. If persons, by frequent attendance at her theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they heard to others. We know of no right of property in gestures, tones, or scenery, which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish.

The counsel for the plaintiff, in their argument, have laid much stress upon the allegation that the defendant has availed himself of a surreptitious copy of the manuscript of the play. But there is no such allegation in the bill, and no such fact is admitted by the demurrer.

It should perhaps be added, to avoid misconstruction, that we do not intend in this decision to intimate that there is any right to report, phonographically or otherwise, a lecture or other written discourse, which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print, or by oral delivery. So any one of the audience at a

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concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition. We found our opinion wholly upon the doctrine that there is nothing in the plaintiff's bill to show that the defendant has done anything beyond that which the limited dedication of the plaintiff's property to the public authorized him to do; and our decision goes no further than to hold, that the representation by the defendant of a dramatic work, of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor, and as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction.

Demurrer sustained.

Cranston Howe *vs.* Francis Conley.

An agreement, in consideration of a sum of money, "to be paid on the 1st of October," to convey a house, "to give a warranty deed of the same," "and clear the house of the tenant therein," is an agreement not only to convey the house, but also that it shall be clear of the tenant, by the 1st of October; and if the tenant unlawfully continues in possession after that day, the vendor cannot enforce specific performance of the agreement in equity.

Action of contract, praying for relief in equity to compel the specific performance of the following agreement, signed by the parties:

"In consideration of $ 2100, to be paid on the 1st of October, I hereby agree to convey to Mr. Francis Conley, house No. 87 Broadway. I agree to give a warranty deed of the same, clear of all incumbrance, except mortgage for $ 1600, held by Mr. Cain, and clear the house of the tenant therein. He agrees to pay the above sum at the said time, and to assume the mortgage on said house held by Mr. Cain, from the 1st of October 1858."

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At the hearing, it appeared that this agreement was signed on the 11th of September 1858; that there was at that time a tenant in the house; that on the 13th of September, the plaintiff applied to an attorney at law to get out the tenant; that he gave the tenant notice to quit in fourteen days, and, as he did not leave, took out, the next day but one after the notice expired, a writ returnable before the justices' court on the 9th of October; that the tenant was defaulted, and execution issued on the 14th of October, and that the house was clear of the tenant on the 20th of October; that a deed was executed by the plaintiff and his wife, and ready for the defendant on the 1st of October, but the defendant objected to pay the money until the tenant was out; and that the plaintiff, on the 20th of October, after the tenant was out, tendered the deed and possession of the premises to the defendant, who refused to receive them. There was also evidence, not material to be reported, upon the question whether the plaintiff, on the 2d of October, waived the performance of the agreement. *Shaw*, C. J. dismissed the bill, without costs, and the plaintiff appealed.

W. Brigham, for the plaintiff. The contract did not require the plaintiff to clear the house of the tenant by the 1st of October, but only to do it with all reasonable despatch. The agreement to take the deed and pay the money was not dependent on the clearing of the house of the tenant; but that was a distinct and independent agreement. *Couch* v. *Ingersoll*, 2 Pick. 292. *Kane* v. *Hood*, 13 Pick. 281. But if these stipulations are not independent of each other, a court of equity will not hold the plaintiff strictly to the time, if he has done all he reasonably could do, as he has in this case. 2 Story Eq. Jur. §§ 776, 777. *Harrington* v. *Wheeler*, 4 Ves. 686. *Hertford* v. *Boore*, 5 Ves. 719. *Taylor* v. *Longworth*, 14 Pet. 172. *Baldwin* v. *Salter*, 8 Paige, 473. Specific performance will be decreed when the contract is fair in all its parts, and unobjectionable, and when its performance will carry into effect the intention of the parties, and promote substantial justice. 2 Story Eq. Jur. §§ 742, 751 - 777. *White* v. *Damon*, 7 Ves. 30. *Hall* v. *Warren*, 9 Ves. 608. *King* v. *Hamilton*, 4 Pet. 311. In this case, there is no pretence of misrep-

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resentation or fraud, or that the fulfilment of the contract will work any injustice to the defendant, or that anything has occurred since the making of the contract, which should prevent its being carried into effect, or that the defendant sustained any loss or injury on account of the tenant not going out on the 1st of October.

J. G. Abbott, for the defendant. The defendant bargained for a house ready for occupation, and was not obliged to take anything different. *Howland* v. *Leach*, 11 Pick. 155. 1 Sugd. Vend. (7th Amer. ed.) 305. The time within which this contract was to be performed was of the essence of the agreement. 1 Sugd. Vend. 359, 360. 2 Parsons on Con. 541, 544 2 Story Eq. Jur. §§ 776 – 780. Under the circumstances, the court in its discretion will not decree specific performance. 1 Sugd. Vend. 341, Amer. note. 2 Story Eq. Jur. § 742. 2 Parsons on Con. 510.

Metcalf, J. The court are of opinion that the true legal construction of the agreement on which this bill is founded is, that the plaintiff should not only convey the house to the defendant, but should also clear it of the tenant, as soon as the 1st of October 1858; that the defendant, on that day, should have the actual occupation of the house secured to him. It seems to us that the 1st of October is as plainly the day on which the house was to be clear of the tenant as it was the day on which the conveyance thereof was to be made by the plaintiff, and payment therefor to be made by the defendant. The house which the plaintiff engaged to convey was a house cleared of the tenant; and the defendant was not bound to pay the consideration and take a deed of a house in which there was a tenant, who had disregarded notice to quit, was wrongfully holding over, and might, by protracted litigation, keep the defendant out of possession for months, if not for years.

The construction which we give to the agreement of these parties renders unnecessary any decision or discussion of other questions which were raised at the bar. *Bill dismissed.*

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Charles Buck *vs.* Levi A. Dowley.

Under the Rev. Sts. *c.* 81, § 8, this court did not have jurisdiction in equity to compel the specific performance of an oral agreement concerning land, even after partial performance thereof.

The general jurisdiction in equity conferred on this court by the *St.* of 1857, *c.* 214, cannot be exercised on a bill filed before its passage.

A bill in equity, filed before the *St.* of 1857, *c.* 214, alleged that the parties made an oral agreement that the defendant should advance the requisite money to purchase a tract of land, and to build warehouses thereon, in consideration that the defendant should be paid from the proceeds all the money so advanced by him, with interest, and five per cent. commission for the use and advancement of the money; that, for greater security, a deed of the land was made to the defendant, which, although absolute on its face, conveyed the land to him as security for the money to be so advanced, and in trust for the plaintiff; that warehouses were erected on the land with money so advanced by the defendant, and money advanced by the plaintiff; that portions of the property were sold, and the proceeds received by the defendant; and that a part of the property remained unsold; and prayed for a conveyance of this part of the property, and for an account. The answer denied the allegations in the bill; and averred that the actual agreement was, that a partnership of which the defendant was a member should advance the money, and receive from the proceeds the amount advanced, with interest, and five per cent. commission for advancement, and six per cent. commission on all amounts received by them therefrom; and that the surplus, if any, should be paid to the plaintiff; and averred performance of the agreement on the part of the defendant and his partner. *Held*, that this agreement did not constitute a partnership between the parties; that it could not be enforced as a trust, nor as a case of constructive fraud; and that the plaintiff could not, without amending his bill, avail himself of the agreement admitted in the answer.

Bill in equity, filed by Josiah L. C. Amee on the 30th of September 1856, and now prosecuted by his assignee in insolvency, alleging that about the 31st of March 1851 Amee, conceiving that a certain parcel of land in Boston might be purchased, and warehouses erected thereon, and then resold to great profit, and being unable to undertake so large an operation without assistance, proposed to the defendant to advance the moneys necessary to purchase the land and erect the buildings, upon the consideration that the defendant should be paid from the proceeds of the subsequent sales thereof all the moneys so advanced by him, with legal interest, and also a commission of five per cent. for the use and advancement of the moneys; that the defendant agreed to the proposal, and to advance the

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moneys necessary in addition to such moneys as Amee might be able to advance from his own means; that thereupon the plaintiff negotiated and agreed with the owner for the purchase of the land for a certain sum, which was advanced and paid by the defendant, and a deed of the land executed to him by the owner for greater security; that, although that deed purported to convey an absolute title to the defendant, yet, by force of the agreement then existing between him and Amee, the defendant did in fact receive and hold the same in trust for the benefit of Amee, and as security for the moneys so advanced and to be advanced according to that agreement; that, after the purchase of the land, Amee proceeded to lay it out in lots, and caused plans thereof to be made, and entered into contracts for the building of nine warehouses thereon, and superintended the same, and paid divers large sums of money on account thereof; and that the defendant, from time to time, advanced other large sums of money, according to that agreement, and received divers sums of money on account of rent of a part of the premises, and from sales of a part thereof; that, before the 13th of October 1852, all the proposed buildings were erected and finished, some of them were sold with Amee's knowledge and consent and the proceeds received by the defendant, and there remained three warehouses unsold; that on that day the defendant rendered an account current, which showed a balance in his favor, and which the plaintiff averred was not a just and true account, but was false and erroneous in many respects, which the bill pointed out; that by force of the agreement aforesaid the defendant received and held the land as trustee for the plaintiff, and in trust, after repayment of all sums of money advanced by him and his said commission thereon, to account with the plaintiff, and to pay over and convey to him what might remain; but that the defendant refused to cause the remaining warehouses to be sold, and insisted that he had a right to hold the same for his own use and in his own right. The bill prayed for a decree that the remaining warehouses should be sold, and for a discovery and account, and for further relief.

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The defendant answered, denying that he made the agreement set forth in the bill, or that by force of any agreement existing between the parties he ever held the property as security for moneys advanced as alleged, or in trust for Amee, or that Amee paid large sums of money on account of the building of warehouses on the land; but admitted an agreement by which he was to purchase the land, and the firm of L. A. Dowley & Company, consisting of the defendant and George F. Butman, were to advance the money to pay for it, and also for building the warehouses, and were to receive in addition to the interest and commission mentioned by the plaintiff, an additional commission of six per cent. on all moneys received from the rents and sale of the land; that as fast as the land was sold, the proceeds, less the commissions, were to be put to the credit of the account of this undertaking; and when all the land was sold and the proceeds so credited, the surplus, if any, was to be paid over to Amee, it being expressly understood that the whole account was to be closed by January 1852; and averred performance of this agreement on the part of the defendant and his copartner.

The plaintiff filed a general replication; and a hearing was had before *Metcalf*, J., at which the plaintiff offered oral evidence to prove the allegations of his bill, and the case was reserved for the consideration of the full court, upon the terms that if upon so much of the evidence offered as was competent the plaintiff was not entitled to relief, the bill should be dismissed; otherwise, such direction should be given to the case as the court should see fit.

F. C. Loring, for the plaintiff.

B. F. Thomas & R. Olney, for the defendant.

Chapman, J. This suit was brought in the year 1856, when the equity jurisdiction of the court was limited. The plaintiff cannot therefore avail himself of its present general jurisdiction. *Sanborn* v. *Sanborn*, 7 Gray, 142. So far then as the bill seeks for the specific performance of a parol contract on the ground of part performance, it is met by the objection that *c.* 81, § 8, of the Rev. Sts., gives the court no jurisdiction of

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such cases. *Jacobs* v. *Peterborough & Shirley Railroad*, 8 Cush. 223. So far as it seeks the enforcement of a parol trust respecting real estate, it is met by the objection that no such trust can exist in this Commonwealth, unless it be a resulting trust, which this is not pretended to be. Rev. Sts. *c.* 59, § 30.

It is contended, however, that as the *St.* of 1855, *c.* 194, gave the court jurisdiction in all cases of fraud, the refusal of the defendant to complete the performance of a parol contract, which has been partly performed, may be treated as a constructive fraud, as has sometimes been done by courts having full equity powers, and that on this ground its full performance may be enforced under this statute. But we are of opinion that this statute, like all the other acts conferring limited equity jurisdiction upon the court, is to be construed strictly, and not to be extended by implication. This view of these statutes is stated in *Attaquin* v. *Fish*, 5 Met. 140, and several other cases. And as the court held that it could not take jurisdiction in matters of fraud under its power to enforce and regulate trusts; *Whitney* v. *Stearns*, 11 Met. 319; so it should refuse to enforce the specific performance of parol contracts, by treating the non-performance as a constructive fraud.

It is not necessary to decide whether the court would now, in the possession of full chancery jurisdiction, enforce such performance on the ground of part performance. It is sufficient to say, that when this suit was brought, the court had no power to enforce the specific performance of any contracts, except such as were in writing. The parol evidence which was offered was therefore inadmissible.

Nor can the plaintiff derive any aid from the admissions contained in the defendant's answer. They set forth an agreement variant from that stated in the bill in most of its important particulars; and in order to avail himself of it as the foundation of a decree, the plaintiff should have amended his bill so as to state it; for in equity, as well as at law, there must be allegations as the basis of proofs, and there must be no substantial variance between them. Story Eq. Pl. § 394, note 2 Dan. Ch. Pract. 1000. Even if the agreement stated in the

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answer could be taken in connection with the acts of performance stated in the bill, a case would not be made upon which the plaintiff could recover, for it would not appear that such a contract as that has been performed by the plaintiff, or that he has done any acts under it; nor would he be entitled to recover for labor performed, materials provided, or money paid in the erection of the buildings. Without other allegations which are not made, he would not be entitled to a discovery or an account. The idea of a partnership, which was suggested in argument, derives no support from the agreement.

Bill dismissed.

OLIVER H. BADGER *vs.* BENJAMIN G. BOARDMAN.

A restriction, in a deed of one of several messuages from the owner of all, that the granted premises are conveyed "subject to the following restriction, that no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon," does not so appear to have been inserted for the benefit of one of the adjoining messuages that it will be enforced in equity at the suit of a subsequent grantee thereof by deed containing no express mention of the restriction.

BILL IN EQUITY to enforce a restriction in a deed from Oliver Downing to the defendant of one of several parcels of land on the westerly side of Bowdoin Street in Boston.

From the bill and answer and evidence it appeared that Downing, being the owner of all these parcels of land, which were described on a plan thereof, dated the 12th of December 1843, and recorded in the registry of deeds on the 21st of March 1844, conveyed to the defendant in fee simple the parcel or lot numbered 3 on the plan, with the building thereon standing, by metes and bounds and "subject to the following restriction; that no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon;" and that on the 25th of December 1844 Downing conveyed the parcel or lot numbered 4 on the plan to George Roberts, with all the rights, easements, privileges and appurtenances thereto belonging, which afterwards came by mesne con-

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veyances to the plaintiff. The bill was dismissed, and the plaintiff appealed.

J. A. Andrew, for the plaintiff, cited *Whitney* v. *Union Railway*, 11 Gray, 363 *& seq.*; *Atkins* v. *Bordman*, 20 Pick. 291, and 2 Met. 457; *Barrow* v. *Richard*, 8 Paige, 351.

J. A. Loring, for the defendant.

Bigelow, C. J. The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney* v. *Union Railway*, 11 Gray, 359, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to enure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title, which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or

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in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of *Whitney Union Railway*, above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle, that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity by accepting the grant the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit. *Bill dismissed, with costs.*

JAMES B. HAWKES *vs.* NAHUM BRIGHAM & others.

A certificate, under the Rev. Sts. *c.* 107, §§ 1, 2, upon a mortgage of real estate, which declares that the mortgagee entered into and upon the mortgaged premises, and declared in the presence and hearing of the two subscribing witnesses, at the time of entering on the estate, that he made the entry thereon and took possession thereof as mortgagee within named for a breach of the condition of the mortgage and for the purpose of foreclosing the same, followed by three years' possession under such entry, is not invalidated by the omission to state that "the entry was open and peaceable," in the absence of evidence to the contrary.

BILL IN EQUITY to redeem land in Boston from a mortgage made by Daniel Quinlan to Nahum Brigham, and by him assigned to John W. Shaw, who entered upon the premises to foreclose the mortgage in the presence of two witnesses, who

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signed and made oath to the following certificate thereof, which was duly recorded; "We the undersigned declare and say that on the tenth day of May A. D. 1853 John W. Shaw entered into and upon the land and buildings described in mortgage deed, to which this certificate is attached, and declared in our presence and hearing, at the time of entering on said estate, that he made said entry thereon and took possession thereof as mortgagee within named, for a breach of condition of the said mortgage, and for the purpose of foreclosing the same."

The case was heard by *Hoar*, J., and reserved by him for the decision of the full court, whose opinion states the facts necessary to an understanding of the point of law decided.

J. B. Robb, for the plaintiff.

S. J. Thomas, for the defendants.

Dewey, J. The title of the plaintiff is that of a purchaser at an auction sale under an execution against Daniel Quinlan of all his right in equity to redeem the land from a mortgage made by Quinlan to Nahum Brigham, and by Brigham assigned to John W. Shaw.

This mortgage, it is alleged by the defendants, had been legally foreclosed, and the right to redeem the same forever barred. It is conceded that it has been thus foreclosed, if the proceedings set forth in the report of the facts of the case are sufficient in law to constitute such foreclosure.

The mode of foreclosing a mortgage of real estate is prescribed by the Rev. Sts. *c.* 107, §§ 1, 2. Instead of a foreclosure by instituting an action to recover possession and obtaining a conditional judgment upon the mortgage, the mortgagee may, without such suit, "make an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming the premises; and such possession, obtained in either mode, being continued peaceably for three years, shall forever foreclose the right of redemption." It is further provided in such case, that "a certificate thereof shall be made on the mortgage deed, and signed by the mortgagor or the person claiming under him, and the same shall within thirty days thereafter be recorded in the registry of deeds where the mortgage is recorded; or else a

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certificate of two competent witnesses to prove the entry shall be made and sworn to before a justice of the peace, and recorded within thirty days after the entry in the registry of deeds; and no such entry shall be effectual for the purposes mentioned in the preceding section, unless a certificate, or a deposition in proof thereof, shall be made and recorded in the manner herein provided."

That the assignee of this mortgage had in fact taken open and peaceable possession of the mortgaged premises, after breach of the condition, for the purpose of foreclosure, and held the same for three years after such entry, was not controverted; but the objection taken and relied upon was that a proper certificate thereof had not been made and recorded. The certificate was under the hands of two competent witnesses, and was duly sworn to and recorded. It was in all respects full and complete, unless the omission to state that the entry "was open and peaceable" is fatal to the foreclosure. It states that the assignee of the mortgage made an actual entry into and upon the land, and that he declared in their presence and hearing that he took possession for breach of the condition of the mortgage, and for the purpose of foreclosing the same.

But it is strongly urged that the omission of the words "open and peaceable" in the certificate are fatal to it as a certificate under the statute. It is said to be so, because the proof of such entry to foreclose can be made only by the certificate, and that such certificate must have upon its face the statement of every fact material to give validity to such entry, as an entry to foreclose the mortgage. It is said that all the facts stated in this certificate may be true, and yet the entry have been neither open nor peaceable. In reply to this it may however be urged, that the only entry that can lawfully be made upon land in possession of another is a peaceable entry. The only lawful entry to foreclose a mortgage is an open and peaceable one. The Rev. Sts. *c.* 104, § 1, having declared that "no person shall make any entry into lands, except in cases where his entry is allowed by law; and in such cases he shall not enter with force, but in a peaceable manner;" we think it is to be assumed,

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in the absence of proof to the contrary, that the actual entry stated in this certificate to have taken place was not one in violation of law, but rather was in accordance therewith. Finding the certificate to state that there was such actual entry upon the lands and buildings described in the mortgage deed, and that a declaration was there made that the purpose of that entry was to foreclose this mortgage, may it not be reasonably and properly inferred that the entry thus made was that open and peaceable entry required by the Rev. Sts. *c.* 107, and which alone would have been authorized under the other provision we have cited in *c.* 104, forbidding all forcible entries upon land, even in cases where an entry is allowed by law? May it not, at least in the absence of any evidence to the contrary, be taken to have been a peaceable entry? After three years' admitted holding the estate after such entry, may it not be assumed to have been an open entry?

This requirement, of an open and peaceable entry upon lands to foreclose a mortgage, was one early introduced into our statutes, much earlier than the provision requiring the recording, in the registry of deeds, of the certificate of two witnesses attesting an entry made by a mortgagee for the purposes of such foreclosure. It had an importance when originally introduced, so far as notice of such entry was to be thereby secured, that has been materially diminished by subsequent legislation requiring a public record of such entry to foreclose. Such record is much more effectual as notice, inasmuch as an open and peaceable entry might be made upon the premises, or some part of them, without coming to the knowledge of the mortgagor.

The precise question raised in the present case has not been adjudicated in any previous case. In the cases, cited by the counsel for the plaintiff, of *Oakham* v. *Rutland*, 4 Cush. 172, and *Swift* v. *Wendell*, 8 Cush. 357, much effect is given to the statute certificate as the proper source of proof of the doing of the acts necessary to establish a foreclosure of a mortgage. The allegation of an actual entry having been made, if duly certified by two witnesses and duly recorded, cannot be con-

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trolled by oral evidence. The same would be held also as to other statements of the acts of the mortgagee, when making such entry.

But the question still recurs, is the omission of the words "open and peaceable," in the certificate, fatal to the foreclosure of the mortgage; and especially is it fatal in a case like the present, where there is no offer of any evidence to show that the entry was otherwise than open and peaceable, and where the fact is not contested, but the objection wholly rests upon the alleged want of a proper certificate reciting the fact that an open and peaceable entry was made by the mortgagee?

The leading object of the certificate is to give notice to all persons concerned, that the mortgagee has entered for foreclosure, and hence the allegation of the purposes of the entry must be definite and certain. It must be stated as an entry to foreclose a particular mortgage. It must state the date of such entry, that all persons may know at what period the foreclosure will be perfected. The manner of entering upon the premises mortgaged, as sanctioned by this court, has not been such as alone to furnish notice, or to secure any useful result to other parties. Thus it has been held that an entry by a mortgagee on one of two separate tracts of land embraced in the same mortgage deed, or, in other words, an entry upon any part, is a good entry upon the whole land mortgaged. *Bennett* v. *Conant*, 10 Cush. 163. *Lennon* v. *Porter*, 5 Gray, 319.

Upon the case as here presented, the court are of opinion that the objection to the sufficiency of the certificate as to the entry to foreclose cannot be sustained. The present case requires us to go no further, as no question arises as to the sufficiency of this certificate to exclude evidence from other sources that this entry was not an open and peaceable one.

Upon the further question, whether if the mortgage was foreclosed, such foreclosure has been waived and the foreclosure opened, we concur with the judge who reported the case, that the evidence fails to establish any agreement to open the foreclosure, or to show any facts which would in law so operate.

Bill dismissed.

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GEORGE L. MONTAGUE *vs.* WILLARD PHILLIPS, Executor.

In a suit in equity to redeem land from a mortgage, if the mortgagee in possession, on demand, renders an untrue account, the court may order him to pay the plaintiff's costs, under the Rev. Sts. *c.* 107, § 19.

BILL IN EQUITY, filed October 23d 1852, to redeem land from a mortgage to Sarah Nichols, the defendant's testatrix. The bill alleged that Nichols took possession of the mortgaged premises on the 25th of October 1849, and that the plaintiff demanded an account on the day of filing the bill. The answer alleged that an account was rendered when demanded on that day, and also previously, and annexed a copy thereof. The cause was referred to a master, who reported that the amounts alleged to have been received for rent and the amounts expended were correctly set forth in said account; but that a larger amount might have been received for rents and a smaller amount expended, if the mortgagee had used the diligence which the law imposes upon mortgagees; and accordingly charged the mortgagee with a much larger sum as rents, and disallowed a large part of the sums paid out. Exceptions were taken by the defendant to the master's report, and overruled.

At March term 1859 the plaintiff moved that the defendant should be decreed to pay the plaintiff his costs, and *Shaw*, C. J., so ordered. The defendant alleged exceptions.

C. A. Welch, for the defendant.

B. F. Brooks, for the plaintiff.

BIGELOW, C. J. Two classes of cases only are intended to be embraced in the provisions contained in the Rev. Sts. *c.* 107, § 19, relating to costs in suits brought for the redemption of mortgages. One is the case where the suit is brought without a previous tender, in which case the plaintiff, as a general rule, is to pay to the defendant his costs. This is a fixed and absolute rule, to be applied in all cases where the omission to make a tender before suit brought is not caused by any refusal, neglect or default of the defendant. All other suits brought for

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the redemption of mortgages come within the second class, in which it is left to the discretion of the court to award costs to either party as equity may require. The phrase "all other cases," as used in the statute, is intended to embrace every case other than those in which the plaintiff is required to pay costs. This is the necessary construction, because the word "other" is a relative term, and can refer only to that class of cases which had been previously provided for in the preceding clause of the section. The exception in the statute, by which the plaintiff who brings his suit without a previous tender is exempted from paying costs in cases where a tender is prevented by the refusal or default of the defendant, does not create a separate class, but only takes such a case out of the first class and puts it within the second. Otherwise, in cases to which the exception applies, there would be no provision whatever for the payment of costs; the plaintiff would be exempt by express provision of the statute; and the defendant could not be liable, because the court would have no power in the exercise of their discretion to award costs against him. Clearly such was not the intention of the legislature. The manifest purpose of the statute was to require the plaintiff to pay costs when he compelled a mortgagee, who was guilty of no default or omission, to come into court and answer to a bill for the redemption of a mortgage, in case it was found there was anything due on the mortgage and no previous tender had been made. This was just and equitable. But all other cases, not coming within this class, were to stand on the same footing as to costs as other suits in equity, and were left to be determined by the court in the exercise of a sound discretion. Rev. Sts. c. 121, § 20. We can see nothing in the legislation on this subject, previous to the Revised Statutes, which in any degree militates with this construction.

Exceptions overruled.

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Caleb W. Loring *vs.* Ephraim L. Eliot & others.

A marriage settlement of real and personal property, executed before the Revised Statutes, recited that the settler "is desirous of securing the said estate, both real and personal, in the event of her marriage, to her sole use and benefit; and for this purpose it hath been agreed that all the estate and property aforesaid shall be granted, assigned and transferred unto J. S., to be held in trust by him for the separate and sole use and benefit of" the settler, "and her heirs, (notwithstanding any such coverture,) upon the terms and conditions, for the uses, intents and purposes, under the limitations, and for and during the time, as hereinafter is expressed;" and conveyed the property to the trustee in trust "to the sole use and behoof of" the settler "and her heirs until the solemnization of any such marriage, and from and immediately afterwards" to be held during her life "to the sole use and separate benefit" of the settler, "without being liable to the debts, incumbrances or control of any husband she may have during the existence and continuance of said trust," to pay the income, as well as such portion of the principal as the trustee should judge necessary for her convenience and support, to the settler or to such person as she without the signature or interference of any husband should appoint, "for and during the natural life" of the settler, "that is to say, for and during the term for which said trust shall continue," and after her decease to pay the unpaid income and transfer the remaining property to her children, if she should leave any, and, in case she should die without issue, then to transfer the same in like manner unto her heirs at law. Among the covenants of the trustee with the settler was one that upon her death he would transfer the property to her child or children if she should leave any; but there was no covenant with respect to her heirs at law. *Held*, that the settler, from the time of her marriage, took an equitable estate for life with a contingent remainder to her children if she should leave any; and with a reversion to herself, in case of her death without issue, which she could lawfully dispose of by will.

Bill in equity for the instructions of the court, filed by the trustee under a marriage settlement executed on the 30th of September 1817 between Elizabeth Fleet Eliot and her father, Ephraim Eliot, which recited that she was seised and possessed in her own right of certain real estate therein described, and was also possessed of certain personal property, stocks, notes, and bond. "And whereas she, the said Elizabeth Fleet Eliot, is desirous of securing the said estate, both real and personal, in the event of her marriage, to her sole use and benefit; and for this purpose it hath been agreed that all the estate and property aforesaid shall be granted, assigned and transferred unto the said Ephraim Eliot, and to such other trustee as shall hereafter be appointed according to the provisions hereinafter expressed, to be held in trust by them for the separate and sole use and benefit of her, the said Elizabeth, and her heirs, (not-

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withstanding any such coverture,) upon the terms and conditions, for the uses, intents and purposes, under the limitations, and for and during the time, as hereinafter is expressed.

"Now this indenture witnesseth, that the said Elizabeth Fleet Eliot, in consideration of the premises, and of the covenants hereinafter contained, and also of one dollar now paid to her by the said Ephraim Eliot, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and transferred, and by these presents doth grant, bargain, sell and transfer, unto the said Ephraim Eliot, his heirs and assigns forever, all the real and personal estate, stocks, notes and bond, hereinbefore described and specified:

"To have and to hold the same to him, the said Ephraim Eliot, his heirs and assigns forever, to and for the several uses, trusts and purposes, and subject to the several provisions, limitations, powers and agreements, hereinafter limited, declared and expressed; that is to say, to the sole use and behoof of the said Elizabeth and her heirs until the solemnization of any such marriage, and from and immediately afterwards to and for the following uses, intents and purposes, to wit, that the said estate, both real and personal, stocks, notes and bond, shall be held, during the natural life of the said Elizabeth, by him, the said Ephraim, and by such other trustee as shall be appointed for that purpose in the manner hereinafter expressed and provided, to the sole use and separate benefit of her, the said Elizabeth, without being liable to the debts, incumbrances or control, of any husband she may have during the existence and continuance of said trust; that said Ephraim shall, from time to time, lease and demise said real estate to the best profit and advantage; and, at such time as he shall see fit and think proper, sell and dispose of all or any part of said real estate, upon the most advantageous terms for the interest of said Elizabeth, and shall invest the proceeds thereof in the safest and most productive funds; and, upon payment of the capital stocks, notes or bond aforesaid, invest the same in like manner; that he shall pay all the rents and profits of said real estate while unsold, and the clear interest and income of said funds, and

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also the clear interest and income of said personal property hereby assigned, and all the net profits arising and accruing therefrom, as well as such portion of the principal as he shall judge necessary for her convenience and support, unto her, the said Elizabeth Fleet Eliot, or to such person or persons as she shall in writing, without the signature or interference of any husband, appoint, for and during the natural life of her, the said Elizabeth Fleet Eliot, that is to say, for and during the term for which said Ephraim's trust shall continue, according to the provisions and limitations hereinafter expressed; and, after the decease of the said Elizabeth, the remaining income and profit unpaid, to the child or children of the said Elizabeth, if she shall leave any; and, upon such decease, grant, convey and transfer the same estate, both real and personal, and any investments in funds, unto such child or children, his and their heirs and assigns, forever; and also grant and convey, in like manner, any real estate which may be purchased with the proceeds of said property: and, in case the said Elizabeth should die without issue, then to grant, convey, and transfer the same, in like manner, unto the heirs at law of her, the said Elizabeth Fleet Eliot."

Said Ephraim covenanted with said Elizabeth that in case she should desire any real estate to be purchased with any part of said capital, and he should think it advantageous and proper, he would purchase and hold the same upon the same trusts and limitations as were therein contained, and pay over the rents and income as above provided, unless she should choose to occupy and live on the same; and that, in case of his mental infirmity or any other incapacity or death, he or his heirs, executors and administrators should convey the trust property to a trustee appointed by the judge of probate. The only other covenant was that "the said Ephraim doth also further covenant as aforesaid, that upon the death of the said Elizabeth, if he shall then be her trustee under the provisions of this indenture, he will grant, transfer and assign all and singular the estate and property which he may then hold under the grant and trusts aforesaid unto the child or children of the said Elizabeth, if she leave any."

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The bill alleged that Ephraim Eliot became duly seised and possessed of the real and personal estate described in the settlement, and continued to hold the same in trust until his death; that on the 10th of December 1849 the plaintiff was duly appointed trustee under the settlement, and so continued until the death of Elizabeth in September 1858, at which time the plaintiff was seised and possessed of certain real and personal estate as trustee as aforesaid; that Elizabeth (who was then the widow of Charles T. Hildreth) died without issue, and by her will devised and bequeathed all her estates to persons other than her heirs at law; and that her executor and devisees, as well as her heirs at law, all of whom were made parties to the bill, claimed the property held by the plaintiff.

C. B. Goodrich & W. Minot, Jr., for the heirs at law, besides some of the cases cited in the opinion, referred to *Richardson* v. *Wheatland*, 7 Met. 169; *Hubbard* v. *Rawson*, 4 Gray, 246, 247; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92; *Blagg* v. *Miles*, 1 Story R. 445; Atherly on Marriage Settlements, 248, 249; 2 Kent Com. (6th ed.) 172, 174, 175; 4 Kent Com. 334, 335; 1 Jarman on Wills, 628, Amer. note.

J. A. Andrew & G. M. Browne, for the devisees and legatees.

Hoar, J. The construction of the deed of trust made by Elizabeth Fleet Eliot to her father was settled by this court in the case of *Hildreth* v. *Eliot*, 8 Pick. 293, so far as it was necessary to determine the questions which that case presented. It was there held, and we have no doubt correctly, that the trustee took the entire legal estate, and that the equitable estate of Mrs. Hildreth was only for life, so that her children, if she should leave any at her decease, would take a remainder as purchasers. The grant was to the trustee and his heirs forever. It was in trust to sell the whole or any part and apply the proceeds to her support as he should judge necessary; and the estate of the trustee must be coextensive with the trust.

The only question which remains to be considered is whether any equitable estate was created in Mrs. Hildreth by force of the provision that, in case of her death leaving no children, the

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trustee should convey the estate to her heirs at law; and this must depend upon the consideration whether the words "heirs at law" in this conveyance are to be construed as words of limitation or of purchase.

In *Shelley's case*, 1 Co. 103, the rule was stated, "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." This rule was abolished by the *St.* of 1791, *c.* 60, § 3, as to wills; but it remained in force as to deeds until the Rev. Sts. *c.* 59, § 9, terminated its application to deeds as well as wills. As this deed was executed in 1817, the rule in *Shelley's case* was therefore in force, and is to be regarded in its construction.

The equitable estate of Mrs. Hildreth was, from the time of her marriage, an estate for life, with a contingent remainder in fee to her children, in case she should leave any at her decease; and a farther limitation, which, if made to any person by name, would have been a contingent remainder, collateral to the first remainder in fee, and therefore good in law. 4 Kent Com. (6th ed.) 200. 2 Doug. 505, note, and cases there cited. But as the second limitation is to her heirs at law, it seems to fall precisely within the rule in *Shelley's case*, to wit, that the ancestor taking an estate for life, and in the same conveyance an estate being limited mediately (that is to say, with an estate interposed between the two) to the heirs, this remainder shall attach in the ancestor, and shall not be in abeyance. 2 Rol. Ab. 417; Remainder, H. pl. 3. And by an application of the same principle, a conveyance in fee, with a limitation of an ultimate use to the heirs of the grantor, is construed as retaining a reversion in him; "for the ancestor during his life beareth in his body (in judgment of law) all his heirs." "And if the limitation had been to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs, the reversion of the fee had been in him, because the use of the fee continued ever in him." Co. Lit. 22 *b*.

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Trusts are subject to the same rules of descent, and are deemed capable of the same limitations, as legal estates. 4 Kent Com. 302. As was said by Lord Mansfield in *Burgess* v. *Wheate*, 1 W. Bl. 160, "whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate." *Parker* v. *Converse*, 5 Gray, 339. *Newhall* v. *Wheeler*, 7 Mass. 189.

But a distinction has prevailed to some extent in regard to the construction of trust estates, especially as to those which are executory, and to those created by marriage settlements; they are to be construed with a much greater deference to the manifest intention, to be deduced from the whole instrument of conveyance, than in construing the like limitations in legal estates. 1 Fearne Cont. Rem. (10th ed.) 90. *Neves* v. *Scott*, 9 How. 196. It is therefore proper to inquire, whether there is anything in the objects of this deed of trust, which would lead to the conclusion that it was intended to alter the usual rule of construction, and to use the word "heirs" as a word of purchase.

The recital preceding the grant to the trustee states that "whereas she, the said Elizabeth Fleet Eliot, is desirous of securing the said estate, both real and personal, in the event of her marriage, to her sole use and benefit; and for this purpose it hath been agreed that all the estate and property aforesaid shall be granted" to a trustee, "to be held in trust for the separate and sole use and benefit of her, the said Elizabeth, and her heirs, (notwithstanding any such coverture,) upon the terms and conditions, for the uses, intents and purposes, under the limitations, and for and during the time, as hereinafter expressed." The estate for life is limited until the marriage to the sole use and behoof of the said Elizabeth and her heirs, and then "to the sole use and separate benefit of her, the said Elizabeth, without being liable to the debts, incumbrances or control of any husband she may have during the existence and continuance of said trust." The income, with such portion of the principal as the trustee shall judge necessary for her convenience and support, is to be paid to her, or to such persons as she shall in writing, without the signature or interference of any

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husband, appoint. At her death, the trustee is to convey and transfer all that remains to her children, if she shall leave any, to them and their heirs and assigns forever; and in case she should die without issue, to her heirs at law.

It would seem to be apparent from these clauses in the deed, that its whole purpose was to secure the estate to the separate use of the wife during her life, free from any control of her husband; and to secure what should remain of it to her children, if she should leave any. So far from anything in the deed showing a purpose to give a different meaning to the word "heirs" from its usual legal import as a word of limitation, it is noticeable that in the covenants of the trustee none is inserted for any disposition of the estate beyond the remainder to the children. It has been suggested at the argument that this omission was accidental; but it is an accident which would not have been likely to occur if the purpose had been to make an express provision for collateral relatives. By limiting the estate in the first instance to the wife for life, with a contingent remainder in fee to the children, if she should leave any, the children would take, if at all, as purchasers; and therefore, although the husband is entitled to curtesy in his wife's equitable estate of inheritance, the condition of an estate by the curtesy, that there should be issue of the marriage which could inherit the estate, would not exist. *Roberts* v. *Dixwell*, 1 Atk. 607. 1 Fearne Cont. Rem. 90. 1 Cruise Dig. tit. 5, *c.* 1, § 22. *Barker* v. *Barker*, 2 Sim. 249. As far therefore as the protection of the estate of the wife and of the children against the control of the husband, or any incumbrance arising from the coverture, was the object, that object was secured.

We are therefore of opinion that Mrs. Hildreth had an equitable reversion, which she could lawfully devise, and that the claimants under her will are entitled to a conveyance from the trustee. *Decree accordingly.*

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Nathaniel J. Bradlee *vs.* Daniel Appleton & others.

A testator bequeathed a sum of money to trustees, to hold and invest the same, "and to pay over the net income thereof semiannually from my decease to my granddaughter until she shall arrive at the age of twenty one years or be married; and upon her marriage the same to be paid wholly over to her, together with any accumulated interest unpaid thereon; and if at the said age of twenty one years she shall still remain unmarried, then to be paid over to such other trustee as she may select, to be held by such new trustee on the like trust, and to pay over to her the net income thereof in like manner until she shall be married, and the same upon the event of her marriage to be wholly paid over to her; and upon her decease without issue living, the said principal sum to be divided among my lawful heirs then living." The granddaughter married after arriving at twenty one years of age, and did not appoint a new trustee. *Held*, that on her marriage the principal sum, with its accumulations, must be paid over to her.

Bill in equity by the trustee under the will of Enoch Silsby, to obtain a construction of the sixth clause of his will, which was as follows:

"I do further give, devise and bequeath unto my said executors and trustees the further sum of five thousand dollars, to be held and invested by them in strict trust, and to pay over the net income thereof semiannually from my decease to my beloved granddaughter Alice Silsby Emmons, until she shall arrive at the age of twenty one years or be married; and upon her marriage, the same to be paid wholly over to her, together with any accumulated interest unpaid thereon; and if at the said age of twenty one years she shall still remain unmarried, then to be paid over to such other trustee as she may select, to be held by such new trustee on the like trust, and to pay over to her the net income thereof in like manner until she shall be married; and the same upon the event of her marriage to be wholly paid over to her; and upon her decease without issue living, the said principal sum to be divided among my lawful heirs then living."

Alice Silsby Emmons was a minor at the time of the death of the testator, and on arriving at the age of twenty one had not been married, and did not elect or appoint a trustee to hold the above sum, but the same continued to be held by the former trustees, of whom the plaintiff was duly appointed successor.

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Afterwards she married Daniel Appleton; and they claimed that the principal sum, with the accumulations, should be paid over to her. The testator's heirs at law contended that she was only entitled to the income of the fund, and that in the event of her death without issue, the principal sum should be paid to those of them who should then be living.

The case above stated was reserved by *Hoar*, J. for the decision of the full court.

C. T. Russell, for the granddaughter.

S. E. Sewall, for the heirs at law.

CHAPMAN, J. The decision of this case depends entirely upon the construction to be given to the sixth clause of Enoch Silsby's will. We think it is the principal sum of five thousand dollars, that is to be paid to the legatee upon her marriage. Nothing else can have accumulated interest unpaid thereon as incident to it. Nothing else can be referred to as the sum to be paid over to such new trustee as she may select, unless we adopt the absurd idea that such new trustee is to receive merely the net income, and pay her the net income of that. What such trustee is to receive is the same which she would receive upon her marriage before coming of age. It is also the same which such trustee is to pay over to her in case of her subsequent marriage. The disposal of it to the heirs of the testator, in case of her decease without issue living, is not necessarily contradictory to any intention before expressed; because, in case of her death without issue and unmarried, some further disposition of it would seem to be necessary. And even if it is to go to the heirs of the testator after her death, still it is to be paid over to her. *Homer* v. *Shelton*, 2 Met. 194. The trustee should pay it to her, and his costs, as they shall be allowed by the court, are to be charged upon the fund. *Decree accordingly.*

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THOMAS H. DUNHAM *vs.* JOSIAH DUNHAM & another, Executors.

A bond given by the executor upon the probate of a will in the probate court is not vacated, but only suspended in its operation, by a subsequent appeal from the probate of the will; and upon an affirmance of the same in this court, no new bond need be given by the executor.

APPEAL from an order of the probate court, dismissing a petition of an heir at law of Josiah Dunham, deceased, that the executors named in his will might be required to give bond for the performance of their trust.

The case was submitted to the decision of this court upon the following facts: The will was duly proved in the probate court on the 18th of May 1857, and on the same day the executors gave bond and received letters testamentary, and were ordered to give notice of their appointment, and immediately published the required notice, and entered upon and proceeded to act in the duties of their trust. On the 15th of June 1857 the petitioner appealed from the probate of the will, and duly entered his appeal in this court, which on the 8th of September 1857 affirmed the decree, and ordered the case to be remitted to the probate court for further proceedings. The executors never gave any other bond.

J. G. Abbott & W. Dwight, for the appellant.

B. F. Thomas & G. F. Homer, for the appellees.

METCALF, J.* The question in the present case is this: When a will is allowed by a decree of a judge of probate, and the executor gives bond, and an appeal is afterwards taken, and the decree is affirmed by this court, does the bond continue in force as if no appeal had been taken, or is it vacated and rendered void by the appeal, so that the executor has no legal authority to act as such until he has given a new bond? And the court are of opinion that the appeal does not make void the bond, but only suspends the operation thereof during the pendency of the appeal; that upon the affirmance of the decree allowing the

* This and the following cases were argued before BIGELOW, C. J., and METCALF, HOAR, and CHAPMAN, JJ.

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will, and the remitting of the case to the judge of probate "for further proceedings," (Rev. Sts. c. 83, §§ 43, 44,) the obligation of the bond and the powers of the executor revive and have effect from the time of the first decree. Such is the law of the English ecclesiastical courts. *Franco* v. *Alvarenza*, 1 Lee, 659. *Blyth* v. *Blyth*, 1 Add. Eccl. 316. *Frankfort* v. *Frankfort*, 3 Notes of Cases, 435. Such also, we believe, is our own law.

There is a great difference between the effect of an appeal from the decision of a court of probate and an appeal from the judgment of other courts. An appeal from a justice of the peace or police court removes the cause itself, and transfers the jurisdiction thereof, and of the parties thereto, to the appellate court; and that court renders judgment therein, and enforces that judgment by its own process. And so it formerly was in cases of appeal from the court of common pleas to this court. But ever since the year 1693 it has been our statute law that an appeal from the probate court may be taken from any order, decree, sentence or denial of the judge. Anc. Chart. 253. *Sts.* 1783, *c.* 46, § 4; 1817, *c.* 190, § 7. Rev. Sts. *c.* 83, § 34. Gen. Sts. *c.* 117, § 8. And the judgment of the appellate court has been, and still is, only upon the order, &c., from which the appeal is taken, and has been and still is certified to the probate court, where further proceedings are had, or are stopped, as if the decision had been made by that court. The appeal gives no jurisdiction to the appellate court to proceed in the settlement of an estate, but only to reconsider the order, &c., appealed from; and its judgment is to be carried into effect by the probate court, whose jurisdiction over the cause and the parties is not taken away by the appeal. See *Curtiss* v. *Beardsley*, 15 Conn. 523; *Small* v. *Haskins*, 26 Verm. 218; *Fletcher* v. *Fletcher*, 29 Verm. 103.

The foregoing is the general, if not the universal, rule of law respecting appeals from courts of probate. If there are exceptions to that rule, they do not include the present case.

If an executor's bond be rendered void by an appeal taken (as in this case) within thirty days from the time of the decree allowing a will, it must also be rendered void by an appeal

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allowed upon a petition filed at any time within two years next after the passing of the decree, by a party who was without the United States when it was passed; (Rev. Sts. *c.* 83, § 41; Gen. Sts. *c.* 117, § 13;) and thus all the intermediate acts of the executor, in the settlement of the testator's estate, be rendered void, although the decree appealed from be affirmed because it was right. A judgment that involves such consequences can be sustained only by some settled and inflexible law, of which we have no knowledge.

In deciding this case we have no reference to the *St.* of 1860, *c.* 189, which the appellees invoked to their aid, because, in our judgment, that statute neither confers nor purports to confer on them any rights or authority which they had not by pre-existing laws. *Order affirmed.*

Caroline Fullam *vs.* Henry McKenny.

The mere fact that an action in which judgment has been rendered for the defendant for costs was brought in the plaintiff's name, without his consent, is no ground for granting a review.

Petition for a writ of review of a judgment for the respondent in the justices' court of Suffolk for costs in an action brought against him by the petitioner for an injury to two pews in a church in Boston, upon which execution was issued and levied by sale of the pews.

At the hearing in the superior court of Suffolk at May term 1859, it appeared that the petitioner lived in Lowell; and that Abel Fullam conveyed the pews to her by a deed, absolute form, but intended only as security for a debt; and, in accordance with the agreement between them, continued to have the care and control of the pews, with authority to receive the rents and sell the pews at his discretion, and apply the proceeds towards the extinguishment of the debt; and brought the original action in her name, without consulting the petitioner, and without her knowledge, or any express instructions or authority so to do.

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Morton, J., being of opinion that this evidence showed an implied authority to use the petitioner's name in a suit for a trespass or injury to the pews, dismissed the petition, and the petitioner alleged exceptions.

J. G King, for the petitioner.

A. C. Clark, for the respondent, was stopped by the court.

CHAPMAN, J. It appears by the bill of exceptions that the petitioner took an absolute title to the pews in question, and that therefore, if an injury was done to them, an action against the wrongdoer must be brought in her name. But the conveyance to her, though absolute in form, was intended to be a mere security for a debt due to her from Abel Fullam, her vendor; and by her agreement he was left in possession of the property, with the right to manage, rent and sell the same, accounting to her for the proceeds. The implied authority to use her name in this suit is very strong; and if he has abused it, her remedy would seem to be by an action against him.

Nor would a review, if granted, afford the petitioner the relief which she seeks. Her object is to quash the whole proceedings as erroneous and void. She contends that the court had no authority to render judgment or issue execution against her, and that the sale of her pews on the execution was invalid, because, as she alleges, a stranger has used her name as plaintiff without her authority or knowledge. But if a writ of review were to issue, it would connect her with the suit as plaintiff. She would cause the defendant to be summoned in to answer to the allegations of the original writ. She would thus make the writ her own, and could no longer treat it as being utterly void. She would also adopt the original entry of the action in court; and having adopted it to this extent, she could not consistently allege that the court had not sufficient jurisdiction of it to render a valid judgment in favor of the defendant for his costs. If she could make it appear, on a hearing of the cause, that judgment ought to be rendered in her favor, the error of the first judgment would be corrected by a new one, but not by quashing the whole proceeding. See Rev. Sts. c. 99.

Exceptions overruled.

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THOMAS R. SEWALL *vs.* CEPHAS C. CHAMBERLAIN.

A certificate of shares in the capital stock of a corporation, previously sold and transferred upon its books, may be signed by the treasurer after the dissolution of the corporation by a decree of this court under *St.* 1852, *c.* 55.

ACTION OF CONTRACT to recover the price of ten shares of the capital stock of the Bay State Mills.

At the trial in the superior court of Suffolk at March term 1859, before *Allen*, C. J., the plaintiff introduced evidence tending to show the defendant's agreement to buy the shares, and a request to have the transfer of them made to his son; that the plaintiff caused the certificates of the stock so sold to be assigned by an indorsement on them to the defendant's son, the transfer entered upon the books of the corporation, and a new certificate made and signed by the president; that the defendant promised to pay for the stock on being furnished with the new certificate; but, before the signature of the treasurer had been obtained, the corporation was dissolved and perpetually enjoined against transacting business, and receivers thereof appointed, by a decree of this court; and that afterwards, and before this action was brought, the new certificate was signed by the treasurer, and tendered by the plaintiff to the defendant.

The plaintiff requested the court to rule that the new certificate was valid, and the treasurer was authorized to sign it when he did, and that if the defendant agreed to pay the price on the new certificate being furnished, he became liable on being tendered the certificate thus issued. But the judge declined so to rule; and instructed the jury "that if they should find that the agreement of the parties was that the plaintiff should procure and deliver to the defendant a certificate to him of the stock before the defendant was required to pay for the same, then it became necessary for the plaintiff to procure a valid certificate; and that the treasurer had no authority to sign the certificate, and the corporation no right to issue a new certificate, after the decree of dissolution." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

S. E. Sewall, for the plaintiff.

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A. A. Ranney, for the defendant.

Bigelow, C. J. When the decree for the dissolution of the corporation was passed, the title to the shares in controversy had been transferred on the books of the company, and nothing remained to be done but to affix to the certificate the signature of the treasurer, and thereby make the evidence of the defendant's title complete. This was only a ministerial duty, which it was competent for the treasurer to perform, notwithstanding the corporation had been dissolved under *St.* 1852, *c.* 55. It involved the exercise of no corporate act or power, but was merely the formal authentication of that which in substance and legal effect had been executed before the dissolution of the corporation took effect. After a decree dissolving the corporation, its officers would have the same power to sign certificates of shares duly transferred on the books of the corporation previously to such decree, as the clerk would have to make up and sign a record of the proceedings of a meeting of the corporation, which he had omitted to enter on the books when the decree of dissolution was passed. In such cases, the act of the officer relates back to, and takes effect from, the time when the transaction which he records or authenticates by his signature was in fact completed. In the present case, as the shares were duly transferred on the books of the corporation before the decree of dissolution was passed, it was the clear duty of the officers of the corporation to execute and deliver the proper evidence of such transfer to the owner or his agent; and they might have been compelled to do so by proper process in case of refusal. The case bears a strong analogy to that class of cases where a note or bill has been sold and delivered, with an intent to transfer the title, but no indorsement has been made on it until after the payee has become bankrupt, in which it has been held that the bankrupt or his assignee is bound to make due indorsement, and may be compelled to do so; and that when his indorsement is made, it has relation to, and takes effect from, the time of the actual sale and delivery of his bill or note. *Smith* v. *Pickering*, Peake R. 50. *Ex parte Greening*, 13 Ves. 206. *Anon.* 1 Campb. 492. *Lempriere* v. *Pasley*, 2 T. R. 485.

Exceptions sustained.

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George Sparhawk & wife *vs.* Peter B. Bagg.

The mortgagor of land, of which the mortgagee is in possession for the purpose of foreclosure, cannot maintain an action of tort against a stranger for using it as a way.

A reversioner cannot maintain an action of tort for a trespass on land, which does not injure the reversionary interest.

A mortgagor, whose mortgage contains general covenants of warranty, does not, by buying the title of the purchaser at a sale of the land for taxes assessed, before the execution of the mortgage, under the Rev. Sts. c. 7, § 7, and *St.* 1849, c. 213, acquire the right to sue a stranger for a trespass afterwards committed, while the mortgagee is in possession for the purpose of foreclosure.

A quitclaim deed of land, bounding it by the land of A., conveys all the grantor's title up to the true boundary of A.'s land, and is not void as to land belonging to the grantor, but held adversely by A. at the time of the conveyance, in consequence of an erroneous location of the division fence.

Where the owners of adjoining tracts of land have conveyed them, agreeing that a strip between them, half on each, shall be used as a way, and reserving the right so to use it, a person having the title of one of them to part of the land, either by inheritance, or by deed bounding on the way, describing it as a street, cannot maintain an action of tort for using the strip as a way against one to whom one of such owners grants another part of the land with like boundaries, or with a right of way over the street so far as the grantor can legally grant it.

Action of tort for entering with horses and carts upon a close bounded southerly on land formerly of Edward Tuckerman, westerly on Tremont Street, northerly by land of the Boston and Worcester Railroad Corporation, and easterly by land of Paschal P. Pope. The defendant, in his answer, put in issue the plaintiffs' title, and justified under a right of way in the Boston and Worcester Railroad Corporation.

At the trial in the superior court of Suffolk at September term 1857, before *Abbott*, J., it appeared that the female plaintiff was one of the heirs of Johnson Jackson, who died in 1825; that before his death Jackson and Tuckerman, owning respectively adjoining tracts of land extending from Tremont Street to Washington Street, made conveyances thereof, each giving by agreement twelve feet to make a passage-way twenty four feet wide, and reserving a right of way therein; that this strip was afterwards called Orange Place or Orange Street, and was the place alleged to be trespassed upon; that the female plaintiff and William Cornell had the title to lands on

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this place under various deeds, all describing the lands granted as bounded by Orange Place or Orange Street; and that the acts complained of consisted in the defendant, as the servant of the Boston and Worcester Railroad Corporation, driving carts over it. There was no evidence of any special damage done to the soil, or any injury to the female plaintiff's reversionary interest therein. The other facts necessary to the understanding of the case are stated in the opinion. The verdict was for the defendant, and the plaintiffs alleged exceptions.

G. Sparhawk, for the plaintiffs.

G. S. Hale, for the defendant.

CHAPMAN, J. The questions presented by this case are whether the several rulings of the judge of the superior court, as stated in the bill of exceptions, are correct.

The first relates to a portion of the *locus*, which is described in the mortgage of the plaintiff George Sparhawk to Lydia Noyes, made on the 14th of March 1857. Before any of the acts complained of were done by the defendant, the mortgagee had entered to foreclose, and she has ever since remained in possession. Sparhawk held the property in right of his wife, and mortgaged his estate. The alleged trespasses consisted of the use of the *locus* as a way by drawing loads of gravel over it with teams. The ruling that the plaintiff had no title to that portion of the premises, sufficient to maintain this action, was correct. If the acts of the defendant were tortious, the mortgagee was the party entitled to the action, and not these plaintiffs, there being no injury done to the reversionary interest.

The next exception is to the ruling that the plaintiffs cannot maintain this action by virtue of the title derived from a deed of Charles Wills to Mrs. Sparhawk made in August 1854. The title of Wills was derived from a deed of James C. Dunn, collector of taxes for the city of Boston, made on the 23d of August 1851. It was a sale of the *locus* for taxes assessed by the city against the plaintiff George Sparhawk in 1849 and 1850; and there was no evidence of actual possession under this tax title. But if there were no other objection to this title, the interest which George Sparhawk acquired under it, which was a tenancy for

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life in right of his wife, would pass to his mortgagee by way of estoppel, the mortgage containing covenants of warranty. Therefore, if any injury was done by the defendant, it was done to the mortgagee, and not to him or his wife.

The next exception relates to the effect of the deed of Mrs. Sparhawk to Walter Cornell, made December 9th 1833, prior to her marriage. He was tenant in common with her of the lot conveyed. The land is bounded "south by Tuckerman's land." But at that time there was a strip of the land some sixteen feet wide in Tuckerman's possession. He and Johnson Jackson were before that time adjoining proprietors, and had established a line between them, which they supposed to be correct, but which proved to be too far north; and Tuckerman had enclosed this land up to that line within his lot by a fence. The plaintiffs contend that as this narrow strip was in the adverse possession of Tuckerman when Mrs. Sparhawk's deed was made to Cornell, the conveyance was merely void as to that part. As to the construction of the deed; if it had bounded Cornell's lot "by Tuckerman's fence," it would be construed to convey nothing south of the fence; but as it bounded the lot "by Tuckerman's land," it must be construed to extend to his true line. The cases of *Cornell* v. *Jackson*, 9 Met. 150, and *Cleaveland* v. *Flagg*, 4 Cush. 76, are conclusive on this point. And by the authority of the latter case, the deed to Cornell was not void as to that land, but he would have been entitled to an action in the name of his grantor to recover it; or if he could get possession of it without an action, peaceably, he would hold it by virtue of his deed. It appears that it has long been open to the public as a way, and the Boston and Worcester Railroad Corporation, the grantees of Cornell, have been able to use it without interruption. The strict doctrines that anciently prevailed in regard to the conveyance of land while it is held adversely to the grantor have been greatly modified of late. The reasons on which they were established have ceased to exist; and the doctrine stated in the cases cited is reasonable and just. And though the deed of Mrs. Sparhawk to Cornell is a quitclaim, so that she might not be estopped from acquiring a better

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title afterwards, yet in this case she has acquired no better title than that which she had when she made this deed. All that she claims now is the same title which she had then, simply relieved from a disseisin. Independently of this consideration, however, the title of Cornell and his grantees is good, and the ruling must be sustained.

The next exception relates to the right of way over Orange Street, easterly of the Cornell lot. The various deeds referred to are bounded by it, by the name of Orange Place. It was used as a way, and this name was given to it as a mere name of designation to distinguish it from other ways and streets in the city. The deed of Cornell to the Boston and Worcester Railroad Corporation conveys "a right of way over Orange Street, so far as I can legally grant it." The way is appurtenant to the several lots bounding upon it, by the fair construction of the several conveyances referred to. The Boston and Worcester Railroad Corporation had a right to use it, and as the defendant used it by their authority this action cannot be maintained. *Exceptions overruled.*

NATHANIEL WHITE *vs.* SAMUEL B. SAWYER & another.

Two owners of a vessel are jointly liable in an action of deceit for fraudulent representations made by one of them, acting for both, in a sale of the vessel; and the damages are not limited to the profit derived by them, or either of them, from the fraud.

ACTION OF TORT against Samuel B. Sawyer and Christopher B. Sawyer for deceit. The defendants filed separate answers. Trial in the superior court of Suffolk at May term 1859, before *Morton*, J., who allowed a bill of exceptions, the material part of which was as follows:

"The two defendants were 'sole owners, each one half,' of the schooner Atlantic, and so conveyed her to the plaintiff. The representations were made by Christopher, and the bill of sale was subsequently executed by them both; but none of the representations were embodied or referred to in the bill of sale; and

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there was no evidence that Samuel knew of the representations before executing the bill of sale.

"The defendants' counsel requested the judge to rule and instruct the jury as follows:

"1st. The two defendants owning and conveying separate and distinct shares in the vessel, the action could not be maintained against them jointly, unless they previously conspired, or else jointly participated in the fraud; and the fraud of one person cannot be ratified or adopted by another so as to make the two liable to a joint action.

"2d. This action was against two defendants jointly, and was based on an executed contract, and damage thereby; and unless a joint liability was proved, the action could not be maintained against either defendant.

"3d. Evidence that Christopher acted as agent for the other defendant would not support this action against the two defendants jointly, no agency being alleged in the declaration.

"4th. Samuel could only be liable for the fraud of his agent, committed without his (the principal's) knowledge to the extent of the damage arising from the sale of his (the principal's) own property; and in such case could not be held as joint defendant in a suit for damages arising from a sale of his agent's property, together with his (the principal's) own individual property.

"The judge declined so to rule; but did instruct the jury, among other things, that they might find a verdict against both defendants, or against Christopher alone; that if, before the representations were made, Samuel had authorized Christopher, as his agent, to make a sale of the vessel, the former would be liable in this action for such damages as the plaintiff had sustained, although ignorant of the representations."

The jury returned a verdict against both defendants, and they alleged exceptions.

G. H. Kingsbury, for the defendants. The defendants were not partners, but owned and conveyed the vessel "each one half;" and there was no allegation or evidence of conspiracy between them. The fraud charged against them consists solely in verbal representations, collateral to the contract, made by

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Christopher alone, without the knowledge of Samuel. Samuel, therefore, is liable, if at all, only on the principle of *respondeat superior;* the plaintiff claiming that Christopher was also the agent of Samuel in effecting the sale of the vessel. But the extent of the agency could be only the sale of the principal's property, which was one half of the vessel; and Samuel would be liable only in the proportion of his interest in the vessel to the plaintiff's whole damage, and could not be jointly liable with the owner of the other half for the entire damage. *Buddington* v. *Shearer*, 20 Pick. 477. *Adams* v. *Hall*, 2 Verm. 9. *Van Steenburgh* v. *Tobias*, 17 Wend. 562. *Partenheimer* v. *Van Order*, 20 Barb. 479. *Russell* v. *Tomlinson*, 2 Conn. 206. The gist of this action is either the false representations, or the damage resulting from the contract. If the latter, the action could not be maintained against either of the defendants, because the contract was not joint, and the contract of neither of them would conform to the declaration. 1 Saund. 291, note. *Weall* v. *King*, 12 East, 452. *Wright* v. *Geer*, 6 Verm. 151. If the gist of the action is the false representations, it could not be maintained against the defendants jointly, because the representations were not made by both, nor with the knowledge of both, and they had no joint interest in the subject of the fraud, or in the fruits of it. *Patten* v. *Gurney*, 17 Mass. 182. *Baker* v. *Jewell*, 6 Mass. 460. *Berkshire Mutual Fire Ins. Co.* v. *Sturgis*, 13 Gray, 179. *Cornfoot* v. *Fowke*, 6 M. & W. 358. The action cannot be maintained against the principal and agent jointly for the tort of the agent alone. *Parsons* v. *Winchell*, 5 Cush. 592. *Campbell* v. *Phelps*, 1 Pick. 62. *Page* v. *Parker*, 40 N. H. 47.

H. F. Durant & A. French, for the plaintiff, cited Story on Agency, §§ 139, 452; Paley on Agency, (3d ed.) 308; 1 Parsons on Con. 62; Parsons on Merc. Law, 152; Long on Sales, (Rand's ed.) 403; *Hern* v. *Nichols*, 1 Salk. 289; *Fitzherbert* v. *Mather*, 1 T. R. 12; *Taylor* v. *Green*, 8 Car. & P. 316; *Fuller* v. *Wilson*, 3 Ad. & El. N. R. 58, 68, 1009; *Doggett* v. *Emerson*, 3 Story R. 735, 736; *Olmstead* v. *Hotailing*, 1 Hill N. Y. 317; *Locke* v. *Stearns*, 1 Met. 560; *Cook* v. *Castner*, 9 Cush. 276;

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Salem India Rubber Co. v. *Adams*, 23 Pick. 265; *Patten* v. *Gurney*, 17 Mass. 184; *Stiles* v. *White*, 11 Met. 356.

Hoar, J. No question is made by the defendant's counsel of the correctness of the doctrine that a principal is liable for the false representations of his agent, although personally innocent of the fraud. It is settled by the clear weight of authority.

But it is contended that the principal and agent cannot be jointly held to answer for a fraud committed by the agent in the course of his agency, in which the principal does not participate; and that this is decisive against the present action. A question somewhat analogous is discussed in *Parson* v. *Winchell*, 5 Cush. 592, where the cases are reviewed and examined.

But we cannot think the principles there laid down are applicable to a case like this. Here the person who made the fraudulent representations was acting, not only as an agent, but also as a principal. In *Cook* v. *Castner*, 9 Cush. 266, which was the case of a sale of a vessel by two part owners, and representations made by one of them as to what the other had told him about repairs made upon the vessel, the action was for a deceit in the sale, and the court say, "He was either so informed by his partner, or he was not. If he was so informed, then the representation was made by Jordan, and bound his partner. If he had not been so informed, then he made a false representation himself, and that bound Jordan." "They were joint owners, engaged at the time in the joint undertaking respecting which the representations were made, and they were equally responsible for each other's statements in regard to it."

That case seems very much like the present; for there, though the two owners are spoken of as partners, they were partners only, as the facts show, by being co-owners of a vessel, which they joined in selling to another party. So in the present case, the parties were "sole owners, each of one half"; but the halves were undivided, and they joined in the sale of them, thus making a sale of the whole.

The action is for the tort, the wrongful act done by the deceit practised in the sale. The damages are not limited to the profit which the vendors or either of them derived from the

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fraud. If one defendant sold only his half, and by himself or his agent committed a fraud in so doing, he would be answerable for the whole injury which the fraud occasioned, although it might exceed the value of the whole vessel. We have, then, the case of two principals sued for false representations made in the sale of property, one acting for himself, and the other acting by an agent. If the agent employed by one had been a third person, there seems to be no doubt that the two principals could be jointly sued. What difference can it make that one of the principals acted as agent of the other? He is joined in the suit, not as agent, but as another principal.

But, farther than this, we think the two owners must be considered as partners in the sale and the fraudulent representations accompanying it; and, upon this ground, are jointly liable. The distinction attempted to be made between that which is done for one part of the chattel and that which is done for the other is rather metaphysical than practical. If two separate owners, each of an undivided half of a carriage, employed the same servant to drive the two halves along a highway, would they not be jointly responsible for his negligence in driving? Yet there it might be said that each employed the man only to drive his separate half. The difficulty is that the careless driving in the one case, and the making a false representation in the other, is an indivisible act. If there is no joint interest in the fruits of the fraud, that is no objection in the case of a conspiracy, where the parties join in the tort, but each for his several advantage. The defendants joined in the act; the one in his own person, for his own profit; and the other, through his agent, representing and binding him by his conduct and statements. In reference to the particular transaction, namely, the joining in doing one thing for their mutual benefit, there would seem to be all the elements of a partnership.

Exceptions overruled.

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Patrick Harkins *vs.* Quincy Mutual Fire Insurance Company.

A by-law of an insurance company, providing that in case of loss the assured shall, as soon as possible, deliver a particular account in writing, under oath, stating the value of the property lost, and of that saved, is sufficiently complied with by a claim for a total loss of the property, stating its value, if some of the property is saved without his knowledge.

Action of contract on a policy of insurance on personal property in a building in Roxbury, made "subject to the provisions of the constitution and by-laws of the said company annexed."

The sixth article of those by-laws was as follows: "In case of loss the insured shall, as soon as possible, deliver to the president or secretary a particular account in writing, under oath, stating the value of the property lost, the nature and value of his interest therein, and if a partial loss, the amount of damage done, and if personal property, the amount on hand at the time of the loss; and in all cases the amount of insurance at other offices, the cause and origin of the fire, so far as known, and the value of such parts as remain. Until this duty has been fully done by the insured, the insurance, or any part thereof, shall not be payable."

At the trial in the superior court of Suffolk at May term, 1859, it appeared that immediately after the fire the plaintiff made a claim for loss, under oath, stating that the property was destroyed by fire on a given day; that the cause of the fire was unknown; that he was the sole owner of the property; that there was no other insurance thereon; the value of the property on hand at the time of the loss, and that of the property destroyed, at the same sum. There was evidence that a part of the property insured was removed into another building and saved; but the plaintiff testified that he did not know that any part had been removed and saved.

The question being argued to the court, neither party asking to have it submitted to the jury, *Morton*, J. ruled that the claim for loss was a substantial compliance with the provisions of the sixth article of the by-laws, and sufficient in law to enable the

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plaintiff to maintain his action. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. M. Keith, for the defendants.

S. J. Thomas, for the plaintiff.

CHAPMAN, J. In stating his claim for loss, the plaintiff, not knowing that any part of the property was saved, made claim for a total loss, and stated the value of the property lost, and the nature and value of his interest therein. This was all that the sixth article of the by-laws required him to do in such a case. The instruction excepted to was therefore right, and the exceptions must be overruled. *Exceptions overruled.*

THOMAS H. HASKELL *vs.* HENRY LAMBERT.

A promissory note, which states that it is "to be held as collateral security for the payment of" certain debts of third persons, is not negotiable, and an indorsee cannot maintain an action thereon, even if the objection that it is not negotiable is not made in the answer.

ACTION OF CONTRACT by the plaintiff as indorsee against the defendant as second indorser of the following promissory note:

"Boston, January 4th 1850. Six months after date I promise to pay to the order of myself twenty four hundred dollars, value received, to be held as collateral security for the payment of E. Boynton's note December 5th 6 months for $968.41; P. E. Webster's note September 7th 6 months for $257.72, and his acceptance December 11th 6 months for $178.10; M. Bartlett & Co.'s note, May 7th 6 months for $435.40; Wm. M. Jackson's note, November 5th 6 months for $562.59.

George Lambert."

No objection was made in the answer to the form of the note; but at the trial in the superior court of Suffolk at May term 1859, *Morton*, J. ruled that if all the facts necessary to make out his case were proved, the plaintiff could not maintain this action, because the instrument declared on was not a negotiable promissory note. A verdict was taken for the defendant, and the plaintiff alleged exceptions.

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T. Willey, for the plaintiff.

W. Brigham & J. M. Pinkerton, for the defendant.

BIGELOW, C. J. The contract declared on is in legal effect a promise to pay a sum of money in six months after its date, if certain debts enumerated in it are not paid by the persons liable therefor. It is therefore not an absolute promise to pay money at all events, but only upon a contingency. Nor is it certain as to the sum which will be payable at its maturity. Being given as collateral security for certain specified debts, for which different persons are liable, the payment of any portion of such debts will reduce the amount *pro tanto* for which the defendant can be held upon his promise. It is therefore an agreement to pay the whole sum in a certain contingency, or such part thereof as may not be paid by certain other persons. In these particulars it lacks the essential qualities of a promissory note. It is a contingent promise, and the sum which will be due upon it at the expiration of six months is uncertain. A promise to pay money, not certain as to amount, and contingent upon a future event, is not regarded as negotiable, because it carries with it on its face notice of the contingency or uncertainty, and the holder or assignee must be bound by the stipulation, and must take it subject to all the equities. Although he may have paid full value for it, he cannot enforce it, except on the prescribed contingency, or for the amount which may at its maturity turn out to be due. Besides, it would essentially infringe on an established and salutary rule of law to hold a conditional or contingent promise to pay money valid, without requiring proof of consideration. The case at bar is very similar to *Robins* v. *May*, 11 Ad. & El. 213, and 3 P. & Dav. 147. See also Byles on Bills, (6th ed.) 71; *Cota* v. *Buck*, 7 Met. 589.

The contract not being negotiable, and there being no proof of any express promise by the defendant to pay to the plaintiff the amount of the note or any part of it, it is clear that the present action cannot be maintained, and that no amendment of the declaration can be made, under which the plaintiff would be entitled to recover. *Exceptions overruled.*

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James M. Matthews *vs.* Henry Allen.

An oral promise by the indorser of a promissory note to pay the same, made, without being misled, after maturity of the note, and with a knowledge that there has been no demand for payment upon the maker, or notice of nonpayment given to himself as indorser, and of all other material facts, is a waiver of the want of demand and notice, and renders him liable on the note without a new consideration, although the note is payable on demand, and he does not know that upon such a note the law required demand and notice.

The indorser of a promissory note made by a corporation, of which he was treasurer for more than a year before it was made, and who is sought to be charged, without proof of demand and notice, upon the ground that he had promised to pay it after it was due, has no ground of exception to an expression of opinion by the presiding judge to the jury, that the defendant, being treasurer of the corporation, must be presumed to have had knowledge that no demand had been made or notice given.

Action of contract upon a promissory note, payable on demand, made to the plaintiff by the Brown and Allen Pianoforte Company, a corporation of which the defendant was treasurer, and by him indorsed.

At the trial in the superior court of Suffolk at May term 1859, before *Allen*, C. J., it was admitted that payment of the note had never been demanded of the maker, and no notice of its dishonor given to the defendant. But the plaintiff introduced evidence tending to prove that at several interviews with the plaintiff, more than sixty days after the making of the note, and with full knowledge of these facts, the defendant promised to pay it; and that he had been treasurer of the corporation for more than a year before the note was made. The defendant testified that he never made the alleged promises, and that at the time of the interviews with the plaintiff, at which they were claimed to have been made, he was not aware of the law requiring demand and notice in the case of notes like the one in suit. The judge instructed the jury, "that if the defendant, with the knowledge of the fact that no demand for payment had been made on the maker, and no notice of nonpayment had been given to the defendant as indorser, and with a knowledge of all the material facts, and without being misled by the plaintiff in any particular, promised the plaintiff to pay the note in suit, long after the expiration of sixty days from its

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date, he cannot now take advantage of the want of demand and notice, on the ground of ignorance of the state of the law; and that the original consideration would be sufficient to sustain a new promise."

Upon the question of fact, whether the defendant had or had not knowledge of the want of demand and notice, (which was not discussed by counsel to the jury,) the judge expressed an opinion to the jury that the defendant, being the treasurer of the company, must be presumed to have knowledge that no demand had been made or notice given.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. A. Ranney, for the defendant, besides cases cited in the opinion, referred to 1 Parsons on Con. 363; Edwards on Bills, 650; Chit. Bills, (10th Amer. ed.) 507, note; *Low* v. *Howard*, 11 Cush. 268; *Cabot* v. *Haskins*, 3 Pick. 83; *Silvernail* v. *Cole*, 12 Barb. 685; *North* v. *Forest*, 15 Conn. 400; *Cook* v. *Bradley*, 7 Conn. 62; *Otis* v. *Hussey*, 3 N. H. 346.

H. F. Durant & G. H. Preston, for the plaintiff, cited also Story on Notes, §§ 274, 275, 362; Story on Bills, §§ 327, 373; Chit. Bills, 500–503; 3 Kent Com. (6th ed.) 147, 148; *Van Derveer* v. *Wright*, 6 Barb. 547.

Chapman, J. The first ruling of the court to which exception is taken was in conformity with the English authorities, and also with those of New York and New Hampshire. Chit. Bills, (10th Amer. ed.) 503 & note. *Tebbetts* v. *Dowd*, 23 Wend. 386. *Edwards* v *Tandy*, 36 N. H. 540.

But there are three early cases in Massachusetts which are often cited as establishing a contrary doctrine, as well in respect to ignorance of the law, as to the consideration for the waiver. *May* v. *Coffin*, 4 Mass. 341. *Warder* v. *Tucker*, 7 Mass. 449. *Freeman* v. *Boynton*, 7 Mass. 483. In neither of those cases does there appear to have been a thorough discussion of either of these points, and the court evidently intended to decide according to the English authorities.

A few years later, in *Hopkins* v. *Liswell*, 12 Mass. 54, after citing those cases, the court say that all the cases show only

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that the subsequent promise, to be binding, must be made with a knowledge of the want of compliance with the necessary formalities; but with that knowledge, there is no doubt that such a promise is binding. It would seem from this that they did not interpret their former decisions so broadly as others have done.

In *Martin* v. *Ingersoll*, 8 Pick. 1, the earlier cases were not cited; but the court held the indorser liable, on the ground that his waiver was made without any misapprehension of the facts. It is true that no pretence of misapprehension of law was there made, so that the effect of such an error was not considered. In *Creamer* v. *Perry*, 17 Pick. 332, Shaw, C. J. states the law to be that if an indorser, knowing that there has been no demand and notice, and conversant with all the circumstances, will promise to pay the note, it is to be deemed a waiver. In *Low* v. *Howard*, 10 Cush. 159, the defendant prevailed, because his waiver was made in ignorance of material facts; but in stating the legal principle applicable to the case, the chief justice stated, in substance, that a waiver made with knowledge of all the material facts is valid.

The maxim, *Ignorantia legis non excusat*, merely holds men to a just responsibility for their acts, and there is no reason for making this case an exception to it. "Every man must be taken to be cognizant of the law; otherwise, there is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case." *Bilbie* v. *Lumley*, 2 East, 472. And a waiver is binding, as a general rule, without any distinct consideration. In view of all the authorities and principles applicable to the subject, we are of opinion that the ruling was correct, and that the earlier decisions of this court, so far as they state a contrary doctrine, cannot be sustained.

The opinion expressed by the presiding judge, in regard to the presumption of knowledge by the defendant in respect to the demand and notice, is to be regarded as an opinion relative to the weight of the evidence, and therefore not subject to exception. The principal objection to it is, that it is very strongly expressed. *Exceptions overruled.*

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Moses G. Cobb *vs.* Ephraim W. Farr.

A mortgage of spirituous and intoxicating liquors passes a title therein to the mortgagee, which will sustain an action against one taking them without authority; and is not invalidated by containing a provision that the proceeds of any sale of the property made by the mortgagor shall be applied to the purchase of articles of the same kind, to be held subject to the mortgage.

Action of tort against a constable for the conversion of a barrel of whiskey. Trial and verdict for the plaintiff in the superior court of Suffolk at March term 1859, before *Huntington*, J., to whose rulings the defendant alleged exceptions. The case is stated in the opinion.

A Cottrell, for the defendant.

M. G. Cobb, pro se.

Hoar, J. The plaintiff's title to certain spirituous liquors which are the subject of this action is under a mortgage duly executed and recorded, in which they are included with other articles in the shop of the mortgagor; the mortgage containing this clause: "And I hereby agree to apply the proceeds which I may realize on sale of any of the articles above enumerated to purchasing articles of the same kind to be held subject to this mortgage." The defendant justified under a writ of attachment under which he seized the liquors as the property of the mortgagor, and denied that the mortgage gave the plaintiff any property in them.

The judge who presided at the trial ruled that a mortgage of liquor was not a sale, within the meaning of the *St.* of 1855, *c.* 215; and that the mortgage vested in the plaintiff a right to recover in this action.

It is unnecessary to determine whether the first part of this ruling was correct or not, because it was immaterial. If the mortgage was a sale, such as the statute of 1855 prohibited, we think the rights of the plaintiff would be in no degree affected. Notwithstanding that statute, spirituous liquors are still property in this Commonwealth. *Fisher* v. *McGirr*, 1 Gray, 47. An action may be maintained against a wrongdoer

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who interferes with the possession or property of the owner. *Arthur* v. *Flanders*, 10 Gray, 107. *Brown* v. *Perkins*, 12 Gray, 89. A sale, even when made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits an offence for which he is punishable, but he does not retain his property in the article sold. It has never been held, under any of the statutes regulating the sale of spirituous or intoxicating liquors in this Commonwealth, that the purchaser was guilty of any offence, or was *particeps criminis*. *Commonwealth* v. *Willard*, 22 Pick. 476. A mortgage is a sale, defeasible upon a condition, but it passes the title, subject to the right of redemption. As it is not criminal in the buyer to take an absolute title, we cannot see that it is criminal in him to take a defeasible title, or that he will fail to acquire all the rights of property which such a title usually gives. The record of the mortgage is made by the statute equivalent to a delivery of the mortgaged article, and the seller had therefore nothing further to do to make the contract complete. He had no *locum pœnitentiæ;* and the plaintiff was invested with the full rights of a mortgagee.

The clause in the mortgage, respecting the reinvestment of the proceeds of any of the mortgaged property which the mortgagee might sell, did not invalidate the instrument. Whether it had any effect or force whatever may well be doubted. But it neither expressly, nor by just implication, authorized the mortgagee to make any sale of the mortgaged property in violation of law. If it had contained an express authority to sell the liquors illegally, and thus had made the mortgagee a participator in the illegal act of keeping the liquors for sale, yet this would be on the assumption that his title as mortgagee had fully accrued; and even if he thereby became liable to the penalties which the statute provides, and to have his property exposed to seizure and confiscation, yet, as was held in *Fisher* v. *McGirr*, he would not on that account be precluded from maintaining an action against a mere wrongdoer, who had taken his property without lawful justification.

Exceptions overruled.

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JAMES SHEPHERD *vs.* GEORGE JACKSON & another.

An officer, who has served a notice of the time and place appointed for the examination of a poor debtor, may be allowed by the magistrate to amend his return by stating the place at which he served the notice upon the creditor, and thus showing the service to have been sufficient, even after the poor debtor's recognizance has been put in suit.

ACTION OF CONTRACT, commenced June 16th 1858, upon a recognizance entered into on the 24th of February 1858, before a master in chancery, by Jackson as principal, and the other defendant as surety, and conditioned that Jackson, who had been duly arrested on execution on that day, should within ninety days from the time of his arrest deliver himself up for examination, giving notice in the manner required in and by the St. of 1857, *c.* 141. The parties submitted the case to the judgment of the court upon the following facts:

On the 18th of May 1858 Jackson applied to a master in chancery to fix a time for his examination; and the master appointed the 19th of May, at noon, and his own office in Court Street in Boston, as the time and place for the examination. The officer's return upon the notice was as follows: "Suffolk ss. Boston, May 19th 1858. At 10 h. 45 m. A. M., I have served the within notice on the within named Shepherd by giving to him in hand a true and attested copy of the same. William Calder, constable." The plaintiff did not appear at the examination, and the oath for the relief of poor debtors was administered to Jackson by the master. The plaintiff, at the time of the service of notice upon him, resided in South Boston, two miles from the master's office; but the notice was in fact served upon him at his own office, within a quarter of a mile of the master's office. On the 17th of May 1859, the master allowed the constable to amend his return by adding thereto the place and distance from the master's office of the service.

J. Cutler, for the plaintiff, cited *Davis* v. *Putnam*, 5 Gray, 328; *Niles* v. *Hancock*, 3 Met. 568; *Leack* v. *Hill*, 3 Met. 173; *Davis* v. *Maynard*, 9 Mass. 247; *Purrington* v. *Loring*, 7 Mass. 392; *Wellington* v. *Gale*, 13 Mass. 488; *Park* v. *Johnston*, 7 Cush. 265.

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J. H. Butler, for the defendants, cited also *Wingate* v. *Commonwealth*, 5 Cush. 446; *Johnson* v. *Day*, 17 Pick. 106; *Bailey* v. *Chesley*, 10 Cush. 284; *Chase* v. *Merrimack Bank*, 19 Pick. 564; *Ward* v. *Clapp*, 4 Met. 455; *Haven* v. *Stone*, 14 Pick. 28.

CHAPMAN, J. The officer's return is the only competent evidence to prove the service of notice on the plaintiff. *Park* v. *Johnston*, 7 Cush. 265. In this case, the return does not show a sufficient notice, unless the amendment was legally made nearly a year after the service. An amendment showing any part of the return to be actually false, and for the purpose of defeating it, would not be allowable. *Davis* v. *Putnam*, 5 Gray, 321. But great liberality is exercised in allowing amendments to supply omissions, or to correct palpable errors, for the purpose of sustaining proceedings when the justice of the case requires it.

In *Johnson* v. *Day*, 17 Pick. 106, the writ was dated November 4th 1833, and judgment was rendered in June 1834. The execution was levied upon real estate which had been attached on mesne process. The officer had by mistake stated in his return the date of the attachment as November 4th 1834; and a mortgagee, whose mortgage was made just before the attachment, but recorded several days afterwards, brought a writ of entry against the judgment creditor to recover the land. During the pendency of this suit, the officer was allowed to amend his return by correcting the date as to the year, and thus the action was defeated. Wilde, J. says: "Amendments of this description are not regulated by any certain rules; but the court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment as may best tend to the furtherance of justice." He cites with approbation *Haven* v. *Snow*, 14 Pick. 28, where an officer was allowed to amend his return, the effect of which was to defeat a title in a third party, which without such amendment would have been valid. In *Chase* v. *Merrimack Bank*, 19 Pick. 564, an amendment of a return upon an execution was allowed after the matter had come into litigation in another suit, and its effect was to defeat the action. In *Thatcher* v. *Miller*, 11 Mass. 413, and 13 Mass. 270, it was held that courts have discretionary power to allow amendments of

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a return, even after the lapse of six years and the suing out of a writ of error. The amendment in that case was not allowed by the court of common pleas, where the return was made, and it was held to be a subject within the discretion of that court.

There are many cases in the books where the matter has been discussed, and amendments allowed or refused. It would be difficult to gather from them any precise limit to the power of the court; and the rule by which its discretion is to be guided is nowhere better stated than by Mr. Justice Wilde in the language above cited.

In the present case, it appears that the amendment allowed by the master was according to the truth. Its purpose was to sustain the proceedings, and save the sureties of a poor debtor from being compelled to pay the debt after he had, upon a proper notice to the creditor, taken the poor debtor's oath; and the only defect was an omission to state in the return the place where the service was made. We think the amendment was properly made. The proceeding is thus proved to be regular, and this action cannot be maintained.

Judgment for the defendants.

COMMONWEALTH *vs.* BARNARD GORMAN.

The refusal to dismiss a complaint on motion for insufficiency in the description of the offence is not a subject of exception.

The fact that a man applied for a license to keep a dog is competent evidence that he was the owner or keeper of the dog, on the trial of a complaint against him for keeping a dog without a license.

COMPLAINT on the Gen. Sts. *c.* 88, § 52, alleging that the defendant at Medway on the 28th of July 1860 "did unlawfully keep a certain small dog of yellowish color, said dog not being licensed, registered, numbered and described; against the peace of the Commonwealth, and the form of the statute in such case made and provided."

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At the trial in the superior court in Norfolk, before *Putnam*, J., the defendant moved to dismiss the complaint, because it did not allege that the defendant had not caused the dog to be registered, numbered, described and licensed. But the judge overruled the motion.

The district attorney called the town clerk of Medway as a witness, and asked him if the defendant did not, on a day subsequent to that alleged in the complaint, apply to him for a license — not for the purpose of proving that such a license had been obtained, but as tending to show that he was the owner or keeper of the dog at the time he so applied. The defendant objected to the question; but the judge allowed it to be put and answered. The defendant, being found guilty, alleged exceptions.

B. W. Whitney, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J. As there is no motion in arrest of judgment, we do not decide whether the complaint is sufficient to sustain the conviction. It was a matter of discretion with the judge whether he would dismiss the complaint, and his refusal so to do is not a legal ground of exception.

The testimony of the clerk of the town of Medway was legally admissible for the purpose for which it was admitted.

Exceptions overruled.

COMMONWEALTH *vs.* ANDREW GROVER.

Upon an indictment, returned since the General Statutes took effect, for unlawfully administering, before their passage, to a woman pregnant with child a noxious thing with intent to procure her miscarriage, a conviction cannot be had under the Gen. Sts. c. 165, § 9, which do not limit the offence to the case of a pregnant woman; but may be had under the St. of 1845, c. 27, upon proof that the defendant did the act alleged to a woman pregnant with child when it was done.

INDICTMENT, returned at September term 1860 in Norfolk, for feloniously, maliciously and without lawful justification administering on the 1st of March 1860 to a woman pregnant with

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child a certain noxious thing, with intent thereby to cause and procure her miscarriage; against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided.

At the trial in the superior court, it appeared that the offence was committed before the General Statutes took effect, and the defendant asked that the jury might be instructed that the indictment could not be sustained under the Gen. Sts. *c.* 165, § 9, or under any law existing at the time of the commission of the alleged offence, because such law was expressly and by implication repealed by the General Statutes.

But *Putnam*, J. declined so to rule; and instructed the jury "that the defendant was properly indicted, and could be properly convicted under the section and chapter referred to, and that the indictment was good under the same." The jury returned a verdict of guilty, and the defendant excepted.

E. Worthington, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

Metcalf, J. The jury were wrongly instructed that the defendant might be convicted under the Gen. Sts. *c.* 165, § 9; because those statutes were not in force when the alleged offence was committed. The defendant, if guilty, is liable under *St.* 1845, *c.* 27, which is still in force as to offences committed previously to its being repealed. Gen. Sts. *c.* 181, § 5. As the jury, under the instructions given to them, might have convicted the defendant without proof that the woman was "pregnant with child," which they could not do under the *St.* of 1845, the conviction cannot be sustained. The indictment is well framed on *St.* 1845, *c.* 27, which is still in force as to the offence charged against the defendant; and he may legally be convicted under the statute, on a new trial, if proof is given that he did the act alleged to a woman pregnant with child when it was done.

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2. Upon an indictment, returned since the General Statutes took effect, for unlawfully administering, before their passage, to a woman pregnant with child a noxious thing with intent to procure her miscarriage, a conviction cannot be had under the Gen. Sts. *c.* 165, § 9, which do not limit the offence to the case of a pregnant woman; but may be had under the *St.* of 1845, *c.* 27, upon proof that the defendant did the act alleged to a woman pregnant with child when it was done. *Commonwealth* v. *Grover*, 602.

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and *St.* 1849, *c.* 213, acquire the right to sue a stranger for a trespass afterwards committed, while the mortgagee is in possession for the purpose of foreclosure. *Ib.*

5. In an action for a personal injury, if the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injury, it is the duty of the court to instruct the jury that he cannot recover. *Gavett* v. *Manchester & Lawrence Railroad*, 501.

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1. Under the Gen. Sts. *c.* 114, § 10, and *c.* 115, § 7, no appeal lies from a judgment of the superior court upon an agreed statement of facts on an answer in abatement. *Blackmer* v. *Davis*, 120.

2. After an appeal has been taken from the judgment of the court of common pleas in a civil action, and entered in this court, and the appellant allowed to plead a certificate of discharge in insolvency, and the case remitted to the court of common pleas for trial of that issue, it is too late to object that the appeal was unauthorized by law. *Glazier* v. *Carpenter*, 385.

3. A bond given by the executor upon the probate of a will in the probate court is not vacated, but only suspended in its operation, by a subsequent appeal from the probate of the will; and upon an affirmance of the same in this court, no new bond need be given by the executor. *Dunham* v. *Dunham*, 577.

See JURISDICTION.

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APPRAISER.

See EXECUTION.

ARBITRAMENT AND AWARD.

An award upon a submission in the country, not returned into court, nor submitting questions of law to the decision of the court, is conclusive upon the parties, although the arbitrators, "at the request of" one of the parties, annex "a statement of the facts and principles upon which the foregoing award was made," "to be taken as part of said award;" and the court will not examine the questions of law arising upon that statement, especially if the facts are complicated, and the questions of law doubtful. *Smith* v. *Boston & Maine Railroad*, 521.

See CONTRACT, 7; MILL, 6.

ARREST.

See WITNESS, 6.

ARREST OF JUDGMENT.

See COMPLAINT, 4; INDICTMENT, 1–6

ASSAULT AND BATTERY.

1. Under a declaration for an assault and battery, containing no averment of special damage, the plaintiff may introduce evidence that his eyes were injured in consequence of a closing up of the tear passage caused by the blows inflicted by the defendant, and may also prove how long it was before he was able to use his eyes after the injury, and how long before his nose got well. *Blake* v. *Lord*, 387.
2. On the trial of a complaint against the owner of cattle for an assault and battery in taking them from a person driving them along the highway, who had found them going at large there without a keeper, the testimony of that person that he was a field-driver of the town, and as such was taking them to the town pound, and had acted as such for many years, is competent and sufficient to prove that he was a field-driver; and his subsequent demand of illegal fees is immaterial. *Commonwealth* v. *McCue*, 226.

See WITNESS, 4.

ASSESSORS.

See BOND, 5; SLANDER.

ASSIGNMENT.

A written order for the payment of a certain sum out of his wages, drawn, for a sufficient consideration, by a workman, employed under a subsisting engagement for a certain time, upon his employer, and by the latter "accepted, payable when earned," applies to wages earned under a new engagement entered into by the workman immediately upon the expiration of the first for lower wages with the same employer; and is not defeated by a sub-

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sequent assignment to another person of the wages to be earned under the new engagement. *Wallace* v. *Walter Heywood Chair Co.* 209.

ASSUMPSIT.

See CONTRACT, 11; INSURANCE, 10; MONEY LENT.

ATTACHMENT.

The exemption by *St.* 1857, *c.* 235, from attachment and execution of "provisions necessary, procured and intended for the use of the family of the debtor, not exceeding fifty dollars in value," extends to corn, potatoes and cabbages planted and raised by the debtor for the use of his family, and ripe for harvest, though not severed from the soil. *Mulligan* v. *Newton*, 211.

See HOMESTEAD, 1; HUSBAND AND WIFE, 2; MORTGAGE, 6; PLEADING, 8; SALE, 1, 2, 5.

ATTORNEY GENERAL.

See INFORMATION.

AUDITOR.

A party who introduces an auditor's report at the trial, and relies upon any part of it as evidence, may be properly required to read the whole report; but is not thereby concluded from controlling by other evidence the *prima facie* case made by the auditor's report in other respects. *Fogg* v. *Farr*, 396.

See COSTS, 1.

AWARD.

See ARBITRAMENT AND AWARD.

BAIL BOND.

See POOR DEBTORS, 2.

BAILMENT.

See CARRIER; WAREHOUSEMAN.

BANK.

1. A draft made by a bank within upon a bank without the Commonwealth for more than the sum of one hundred dollars, contrary to the Rev. Sts. *c.* 36, §§ 57, 62, is not void; but an innocent holder, after due demand upon the drawees and the bank, may recover the amount thereof, with interest at the rate of two per cent. a month, under §§ 60 – 63. *Faneuil Hall Bank* v. *Bank of Brighton*, 584.
2. A bank is responsible for the acts of its cashier, in making a draft upon another bank for the payment of money at a future day certain, contrary to the Rev. Sts. *c.* 36, § 57, although fraudulently drawn by him, for the purpose of concealing his embezzlement of the funds of the bank. *Ib.*

See BOND, 1 – 4.

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BAR.

See INSOLVENT DEBTORS, 2; INSOLVENT ESTATES, 1; JUDGMENT, 1; MILL, 6; PLEADING, 8.

BASTARDY PROCESS.

On the trial of a bastardy process, the respondent cannot ask the complainant on cross-examination whether she has had criminal intercourse with other persons more than ten months and twelve days before the birth of her child; nor introduce evidence that the complainant's character for chastity was bad for two or three years before the child's birth. *Paull* v. *Padelford*, 263.

BILL IN EQUITY.

See EQUITY PLEADING, 1, 2.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF EXCHANGE.

See BANK; PROMISSORY NOTE.

BILL OF LADING.

See FREIGHT.

BOND.

1. A cashier's bond, voluntarily executed, and containing nothing contrary to law, is valid, although the condition varies from the form required by the Rev. Sts. *c.* 36, § 27. *Grocers' Bank* v. *Kingman*, 473.
2. The sureties on a cashier's bond are not entitled to notice of the cashier's resignation, or of his default, nor need any demand be made upon them, before action brought on the bond. *Ib.*
3. The sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his fraud, inattention or negligence in the performance of his duties, are exonerated, by an increase of the capital stock of the bank after the making of the bond, from liability for acts of the cashier after the additional capital has been paid in. *Ib.*
4. The conveyance by a cashier to the bank of his property to cover certain known defalcations of his does not entitle the sureties on his bond to have that property applied in discharge of their liability for an embezzlement which was not known to the bank at the time of the conveyance. *Ib.*
5. If a collector of taxes gives a bond with sureties for the collection and the payment to the town and county treasurers of the amount of a tax which has been assessed, and for the collection of which he has received a warrant; and the assessors afterwards reassess and reduce the tax for excess of the overlay, and alter the sums named in the bond accordingly, without the

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knowledge of the obligors, and deliver no new warrant to the collector; no action can be maintained on the bond. *Doane* v. *Eldridge*, 254.

6. Upon a bond to save the grantee of land subject to a mortgage harmless from a second mortgage, and to cause it to be assigned to him within six months, a failure to cause such assignment to be made within the six months will entitle the plaintiff, even after foreclosure of the first mortgage, to maintain an action; and, if the estate is not worth more than the sum of the two mortgages, to recover the difference between its value and the amount due on the first mortgage. *Coombs* v. *Jenkins*, 153.

See APPEAL, 3; DAMAGES, 1; EXECUTOR AND ADMINISTRATOR, 2–5; HUSBAND AND WIFE, 1; PLEADING, 1; RAILROAD, 1–5.

BOUNDARY.

See DEED, 1.

BRIDGE.

1. A statute authorizing county commissioners to lay out as a public highway a bridge originally established by the legislature over a navigable stream, and used as a public way for two hundred years, during which period the legislature has from time to time imposed upon various towns the expense of keeping the bridge in repair, and releasing from their obligation some of the towns upon which the duty and expense of maintaining it has been imposed by previous statutes, is constitutional; and leaves it the duty of the towns not released to maintain the bridge until the exercise by the county commissioners of the authority conferred upon them, even after their refusal, upon petition, to lay out the bridge as a public highway. *Attorney General* v. *City of Cambridge*, 247.

2 The *St.* of 1860, *c.* 95, releasing the towns of Lexington and West Cambridge from the obligation of contributing to the expense of maintaining the Great Bridge between Cambridge and Brighton, and of repairing and tending the draw, imposed upon them by earlier statutes, is constitutional; and imposes upon Cambridge and Brighton the whole duty and expense of maintaining, repairing and tending the bridge and draw, until the county commissioners lay out the bridge as a public highway. *Ib.*

3. The resolve of May 4th 1781, "that the towns of Cambridge and Lexington be at the whole expense of repairing said bridge, until the grants made said towns by the general court be wholly expended," did not release those towns from the obligation to repair the bridge after the expenditure of the fund granted. *Ib.*

BROKER.

See COMMISSIONS; CONTRACT, 4, 5; EVIDENCE, 2, 17; FRAUDS, STATUTE OF, 2; PRINCIPAL AND AGENT, 2.

CARRIER.

1. If upon the arrival at the place of their destination of goods delivered to a railroad corporation for transportation, the agent of the owner of the goods,

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in the presence of the station master of the corporation, removes a portion of them from the car in which they have been transported, saying that he will come again for the rest, and some of the rest are afterwards lost from the car or from the freight-house of the corporation, it is a question for the jury, in an action by the owner of the goods against the corporation for the loss, whether the delivery to the plaintiff's agent of the portion of the goods taken by him from the car was intended by the parties for a delivery of the whole or only of the portion taken. *Sessions* v. *Western Railroad*, 132.

2. The liability of a railroad corporation as common carriers for goods delivered to them for transportation ceases when the goods have been taken from the car in which they have been transported to the place of destination, and stored in a freight-house of the corporation; and the corporation are thereafter liable only as warehousemen. *Ib.*

3. In an action against a railroad corporation to recover the value of goods received by them for transportation and lost, if there is any question whether the loss occurred while the liability of the defendants was that of common carriers or while it was that of warehousemen only, this question must be determined by the jury; and if the jury, on returning a verdict, in answer to an inquiry of the presiding judge, state that this question was not considered, a new trial must be ordered. *Ib.*

CASES OVERRULED, DOUBTED OR DENIED.

BANK OF WILMINGTON & BRANDYWINE *v.* WOLLASTON, 3 Harringt. 90.
Grocers' Bank v. *Kingman*, 477.
CALVERT *v.* SEBRIGHT, 15 Beav. 156. *Hoxie* v. *Finney*, 334.
COCKERILL *v.* CINCINNATI MUTUAL INS. CO. 16 Ohio, 148.
Sanborn v. *Fireman's Ins. Co.* 453.
FREEMAN *v.* BOYNTON, 7 Mass. 483. *Matthews* v. *Allen*, 595.
THE KING v. GILL, 2 B. & Ald. 204. *Commonwealth* v. *Wallace*, 224.
MCNEIL, *Ex parte*, 6 Mass. 264. *May* v. *Shumway*, 87.
MAY *v.* COFFIN, 4 Mass. 341. *Matthews* v. *Allen*, 595.
MILLS *v.* CATLIN, 22 Verm. 98. *Hoxie* v. *Finney*, 334.
MORRIS *v.* KELLY, 1 Jac. & Walk. 481. *Keene* v. *Kimball*, 549.
STEINER *v.* BAUGHMAN, 12 Penn. State R. 106. *Hoxie* v. *Finney*, 334.
WARDER *v.* TUCKER, 7 Mass. 449. *Matthews* v. *Allen*, 595.

CASHIER.

See BANK, 2; BOND, 1–4; PLEADING, 1.

CERTIORARI.

1. Technical objections to a petition to county commissioners for the assessment of damages cannot be first made upon an application for a writ of *certiorari* to quash their proceedings. *Inhabitants of Plymouth* v. *County Commissioners*, 341.

2. A writ of *certiorari* will not be granted to quash the proceedings of county commissioners in assessing damages for the taking of private property for

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public uses, because the commissioners have assessed the entire damages suffered on a petition which does not definitely allege the extent of the damages, if no objection was made at the hearing before the commissioners to the admission of evidence of the extent of the damages caused by the taking. *Ib.*

3. A petition to county commissioners to assess the damages caused by the taking of water and of water power for a public use, under *St.* 1855, *c.* 61, alleged the petitioners' seisin and possession of a mill and water power, and set forth the nature and extent of their rights in such water power and in the water of a certain pond, and then alleged that the town took a portion of the said water power and water, tapping said pond and conducting a part of the water by a canal to another pond, and at sundry times deepened the canal, thereby diverting a portion of the water of the first pond which formerly flowed by the petitioners' mill, and diminishing their water power. *Held*, that an assessment of damages upon this petition should not be quashed on a writ of *certiorari* for uncertainty in the petition; nor because it appeared by another petition for the assessment of like damages, that the commissioners, without objection, so far as appeared, had assessed entire damages under the first petition; nor because the petition did not allege that the price to be paid by the town for taking the water could not be fixed by agreement with the owners. *Ib.*

See COUNTY COMMISSIONERS, 2; TAX, 3, 4.

CHARTER PARTY.

Under a charter party which provides that "twelve running days for each one hundred register tons be allowed to the charterers for loading the ship; nevertheless in no case shall the charterers have less than thirty nor more than eighty running days in all, Sundays and holidays excepted;" Sundays and holidays are to be included in computing the "twelve running days." *Crowell* v. *Barreda*, 471.

CITY.

See TOWN.

CLERK.

See COMPLAINT, 4.

CODICIL.

See WILL, 8.

COLLECTOR OF TAXES.

See BOND, 5.

COMMISSIONS.

If a middleman brings together a buyer and a seller, each of whom has agreed, without the knowledge of the other, to pay the middleman a commission on any contract which may be made between them, and a contract

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is made between them, in the making of which the middleman takes no part as agent for either, the conduct of the middleman in concealing from each his agreement with the other is not fraudulent, and is no defence to an action brought by him against either to recover the commission agreed upon. *Rupp* v. *Sampson*, 398.

See EVIDENCE, 17.

COMPLAINT.

1. A description in a complaint of a building as the property of Nathan S. Hoard is not supported by evidence that it was hired of Nathan Hoard, and that the defendant spoke of it as belonging to Mr. Hoard. *Commonwealth* v. *McAvoy*, 235.
2. A complaint charging the commission of an offence on a certain day, and from that day to the day of the date of receiving this complaint, and certified by a magistrate to have been received and sworn to on a certain later day, is a sufficient charge of the offence during the whole time. *Commonwealth* v. *Frates*, 236.
3. A complaint containing two counts for different offences, the first of which distinctly describes the complainant, the defendant, and the place, and the second as "said complainant," "said J. S.," and the "town and county aforesaid," will support a verdict of guilty on the second count, although the defendant is acquitted on the first count. *Commonwealth* v. *Clapp*, 237.
4. It is no ground for arresting judgment in a criminal case, that in the copy of the record of the police court, in which it was commenced, attested by the clerk of that court, the complaint appears to have been certified by another person as clerk *pro tempore*, and no contingency in which the appointment of such a clerk is authorized by statute is stated. *Commonwealth* v. *Clark*, 88.

See EXCEPTIONS, 1; LARCENY. MILL.

CONDITION.

1. A deed of land to a number of persons incorporated as a religious society, *habendum* to them and to their heirs and assigns "and to each and every person who may hereafter become lawful owners and proprietors of a pew in the meeting-house to be built and erected thereon, and which may and shall afterwards be rebuilt thereon by the said proprietors and their successors, to the use and behoof of the said proprietors for the said purpose, and of each and every lawful owner and proprietor of a pew or pews in the meeting-house to be built and rebuilt on the said lot of land forever," without any clause providing for forfeiture or re-entry, is not a grant upon condition that a meeting-house shall be erected and maintained upon the land conveyed. *Packard* v. *Ames*, 327.
2. A parcel of land was conveyed "in consideration of love and good will for and towards the Methodist Church and Society of A." to an individual, "in trust for the use and benefit of said church and society, their heirs and assigns, in trust for the use of the members of the Methodist Episcopal Church usually attending religious worship in A. under the conditions and

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restrictions hereinafter written," *habendum* "in trust as aforesaid forever, upon the following conditions and restrictions: that the same shall be and remain forever under the control and direction of such members of said church as are embraced with the feelings and opinions of the antislavery society for the immediate abolition of slavery in the United States; and further, that in no case is the general conference of the Methodist Episcopal Church to have any right in said premises and building, or take any control or direction of the same." *Held*, that this deed created an estate upon condition; and that the union of this church with an annual conference subordinate to the general conference of the Methodist Episcopal Church, and receiving a minister appointed by the bishop thereof, and conveying the land to trustees nominated by such minister, according to the usage of that church, were a breach of the condition. *Guild* v. *Richards*, 309.

3. Breach of a condition subsequent in a deed does not revest the land in the grantor without entry. *Ib.*
4. In this commonwealth, as at common law, the grantor of an estate upon condition cannot convey his right of entry for breach of condition to a stranger. *Ib.*
5. Turning cattle upon land while unimproved and unenclosed, and using the land while in that state as a means of access to adjoining land, is not such an entry for breach of condition as will revest the estate in the grantor. *Ib.*
6. A grantor who has once waived a right of entry for breach of condition cannot afterwards take advantage of it. *Ib.*

See CORPORATION, 1.

CONFLICT OF LAWS.

See WILL, 8.

CONSIDERATION.

See CONTRACT, 1; PROMISSORY NOTE, 1, 2, 8, 15; RELEASE.

CONSPIRACY.

An indictment for a conspiracy must set out the unlawful agreement in such detail as to show a conspiracy to effect the purpose by illegal means, and to inform the defendants of the acts intended to be relied on, and enable the court to judge of their character; and does not do this sufficiently by alleging that the defendants, maliciously contriving, devising and intending to cheat and defraud a person named, and to obtain from him a specified sum of money by means of false pretences, unlawfully conspired to obtain that sum from him, and then setting forth the acts done in the execution of the agreement. *Commonwealth* v. *Wallace*, 221.

CONSTITUTIONAL LAW.

See BRIDGE; EMINENT DOMAIN; HOMESTEAD, 3, 4.

CONTINGENT INTEREST.

See TRUST, 1.

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CONTRACT.

1. The implied promise of the promisee to hold and appropriate the funds subscribed, in conformity with the terms and objects of the subscription, is a sufficient legal consideration for the promise of a subscriber to a fund for the endowment of a corporation created for charitable purposes. *Ladies' Collegiate Institute* v. *French*, 196.

2. An agreement, in consideration of a sum of money, "to be paid on the 1st of October," to convey a house, "to give a warranty deed of the same," "and clear the house of the tenant therein," is an agreement not only to convey the house, but also that it shall be clear of the tenant, by the 1st of October; and if the tenant unlawfully continues in possession after that day, the vendor cannot enforce specific performance of the agreement in equity. *Howe* v. *Conley*, 552.

3. B., the owner of a patent right for making fireproof safes, granted to A. the exclusive right of making and vending the same in New England; and A., in consideration thereof, agreed by indenture with B. to keep a true account of the number of "said safes," and the weight of each, made or sold by him, and to pay B. one cent a pound on the weight of "said safes so sold;" that "all safes" made or sold by A., "consisting of a double case or box, with the intermediate space filled with plaster or other non-conducting substance, shall be considered as coming within this agreement, and accounted for as above stipulated;" that A. would not carry on the manufacturing of "said safes" out of the city of Boston and its environs, without B.'s consent, nor offer "any such safes" for sale out of New England, and would furnish a sufficient supply of "said safes" for the demand therefor in New England at a limited price, made of good material and in a workmanlike manner; and that "the safes sold under the said license" should be marked with the name of B.'s patent; and the parties mutually agreed that any discovery or improvement in the manufacture of "said safes," that might be acquired by either, should be communicated to and be for the benefit of the other, whether patented or not; and that they would bear equally the expense of any suit that might be instituted by either in New England for infringement of the patent. The specification of the patent covered only safes filled with plaster of Paris. *Held*, that A. was bound to account to B. for all safes manufactured and sold by A., not constructed in conformity with the specification, and in which the intermediate space was filled with any non-conducting substance, though substantially and materially different from plaster of Paris. *Held, also*, that B. was entitled to receive one cent per pound of the weight of all safes, made in infringement of the patent, for which suits had been brought and damages recovered at their joint expense. *Wilder* v. *Adams*, 478.

4. A broker, through whom an offer was made in Boston by a principal doing business in New York, for the purchase of a quantity of copper, was asked by the seller whether intelligence had been received in New York of any advance in the price of copper in Europe, and replied, "None that I know of," and the seller then agreed to sell upon the terms proposed by the

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broker. Intelligence of such advance in price had in fact been received in New York, and was known to the broker's principal there, before the contract was made, but was not known to the broker; and this intelligence would have been of material importance to the seller in determining whether he would sell on the terms proposed. *Held*, that the contract was valid, and might be enforced against the seller. *Held, also*, in an action so to enforce it, that it was not competent for him to show that, at the time the contract was made, there was in the market and among sellers of copper a general expectation that the next steamer, arriving from Europe, would bring intelligence of an advance in the price of copper. *Coddington* v. *Goddard*, 436

5. At the trial of an action by the purchaser to recover damages for a failure of the seller to deliver a quantity of copper, it appeared that an offer was made to the seller through a broker, for the purchase of three hundred thousand pounds of copper; that after some conversation the seller offered to sell two hundred thousand pounds upon the terms proposed, reserving the right to add one hundred thousand pounds more on the same terms, the next day, if he wished; and that the broker, after saying it was a sale, entered the transaction in his books, as a sale of two hundred thousand pounds, without any mention of a right of the seller to add one hundred thousand pounds more the next day. The presiding judge refused to instruct the jury, as requested by the defendant, that if they found it was part of the agreement that one hundred thousand pounds of copper might be added by the seller on the next day, the broker's entry was insufficient as a memorandum in writing under the statute of frauds; but did instruct them that the broker must record, in all essential particulars, the exact contract he had authority to make; that if they were satisfied that he omitted any essential element of it, there was no valid contract; that the omission to state in the memorandum the defendant's right to add one hundred thousand pounds would not invalidate the contract, unless they should find that the sale of the two hundred thousand pounds depended upon the right to deliver the one hundred thousand pounds additional on the next day; but that if they should find that the right to deliver the one hundred thousand pounds was made a condition of the bargain, and was so far an element of it, that none of it was to be binding unless this was, then the omission to insert it in the memorandum would be fatal to the action. *Held*, that the defendant had no ground of exception. *Ib.*

6. A., in consideration of a sum of money paid to him by B., agreed to obtain from C., and deliver to B. to be cancelled, certain promissory notes of B., which both supposed to be then held by C., but which had in fact been negotiated to other parties, who afterwards brought suits and recovered judgment thereon against B., and in one of these suits A. was summoned and charged as trustee of B. for the money paid to him by B. in consideration of their contract, and paid it on execution. *Held*, that A. was not liable to B. for a failure to obtain the notes, nor for the amount which he had paid on execution in the trustee process. *Cady* v. *Clark*, 73.

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7. If an agreement between two railroad corporations provides that what is reasonable and necessary to be done by one of them, at the expense of the other, pursuant to certain contracts between them, and what is a reasonable expense for doing it, shall be determined by the superintendent of the first corporation and another person named; and afterwards, and before the time for making the determination, the office of such superintendent is abolished by the corporation, and the duties of superintendent assigned to its president; he is the proper person to join in the determination, and it is for the jury to determine who is in fact discharging the duties of superintendent at the time of the determination. And an agreement between such president and an agent of the other corporation, that the latter may be present at the hearing and make objections to any item of such expense is immaterial, and its admission in evidence no ground of exception. *Connecticut River Railroad* v. *Williston*, 64.

8. In an action upon a guaranty of payment of all money to be found due from one corporation to another by persons named in a written agreement, the failure of the second corporation to do a certain thing which it had agreed to do before the determination of that amount is no ground of defence, if the persons named in the agreement have proceeded to make the determination with the assent of both corporations. *Ib.*

9. A. contracted in writing to furnish materials and build a house for B. for a certain sum, to be paid by B. After A. had entered upon the performance of his contract, C. agreed to pay him according to his contract with B. if he would go on and finish the house. *Held*, that C. was liable to A. for all work done and materials furnished after C.'s undertaking, although A. had previously commenced proceedings against B. to enforce a claim for a mechanic's lien on the house for labor and materials. *Held, also*, that after C. had introduced evidence of the proceedings to enforce this lien, as tending to show that A. believed that his claim was against B. alone, A. might introduce evidence that at the time of making that claim he spoke to his counsel in those proceedings about his claim on C. *Held, further*, that C. could not introduce evidence that he was a person of large property and in good credit, without other evidence that these facts were known to A. *Allen* v. *Leonard*, 202.

10. The parties to a written contract for the sale of a quantity of standing timber, to be cut and delivered within a certain time at a certain place and paid for in six months after delivery, agreed afterwards in writing to postpone the time for cutting and delivering the timber, except a portion already at the place of delivery, and an additional portion already cut and to be delivered on request; and these portions were afterwards delivered. *Held*, that the original contract was thereby severed, and that after six months from such delivery an action might be maintained on the original contract for the price of both these portions. *Newton* v. *Winchester*, 208.

11. County commissioners laid out a road and ordered a town to build it. A man agreed with the town to build the road in accordance with the order and to the acceptance of the commissioners, for a specified price. The com-

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missioners refused to accept the road as completed by him, and, after he had sued the town, ordered additional work to be done upon it, for which the town was obliged to pay. *Held*, that he could not be permitted to show that their refusal was unreasonable; but that if he left the road without fraud or wilful default, believing it to be completed as required by his agreement, he was entitled to recover from the town the fair value to the town of his labor and materials; and that such value would be the price agreed, less the amount paid by the defendants for the additional work ordered by the commissioners. *Walker* v. *Inhabitants of Orange*, 193.

12. If a contract of sale of personal property, under which it has been delivered to the buyer, is rescinded by agreement of the parties, and the buyer retains possession for the purpose of repairing the property for the seller, no further act is necessary to revest the title in the seller. *Beecher* v. *Mayall*, 376.

See ASSIGNMENT; BANK; CHARTER PARTY; COMMISSIONS; CORPORATION, 1; DAMAGES, 3; EQUITY, 3, 5; EVIDENCE, 2–4; FRAUDS, STATUTE OF; FREIGHT; HUSBAND AND WIFE, 1; INSURANCE, 1, 4; JUDGMENT, 1; PRINCIPAL AND SURETY; PROMISSORY NOTE, 9, 10; RECEIPT; SALE, 3; TRUSTEE PROCESS, 1; WILL, 3; WITNESS, 2.

CONTRIBUTION.

See MANUFACTURING CORPORATION, 4.

COPYRIGHT.

See EQUITY, 1.

CORPORATION.

1. The corporators named in a charter from the legislature, establishing a charitable corporation at Amherst, elected twelve associates, and organized themselves as a corporation. A year afterwards, the charter was amended by the legislature so as to permit the location of the corporation either at Amherst or such other place as the corporation should select; and a meeting of the original corporators was called, at which they elected twelve associates, retaining some and leaving out others of those elected before, reorganized the corporation, and located it at Worcester, where its business was afterwards carried on. *Held*, that the power of the corporators to organize was not exhausted by their first organization, but that for real or supposed errors therein they might reorganize; that if the associates originally elected acquiesced, the reorganization was valid; that the corporation as reorganized might maintain actions on agreements to subscribe certain sums for its endowment, payable to the treasurer of the corporation, describing the institution as "to be located at Amherst, as provided by the charter, or in some other suitable place, subject to the action of its legal trustees, with the consent of the general court," whether signed before or after the second organization and the location at Worcester; and that a condition of such agreements, that no subscription should be binding unless the sum of twenty thousand dollars should be subscribed before a certain date, was complied

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with by subscriptions to that amount, either in the same form, or "towards its two hundred thousand dollars endowment, provided it is to be located at Worcester," although the sum last named had not been obtained. *Ladies' Collegiate Institute* v. *French*, 196.

2. A certificate of shares in the capital stock of a corporation, previously sold and transferred upon its books, may be signed by the treasurer after the dissolution of the corporation by a decree of this court under *St.* 1852, *c.* 55. *Sewall* v. *Chamberlain*, 581.

See ACTION, 1; CONTRACT, 1, 7, 8; EVIDENCE, 16; FOREIGN INSURANCE COMPANY; INSURANCE, 2; PROMISSORY NOTE, 16; RAILROAD, 1–5.

COSTS.

1. The prevailing party in a civil action is entitled to tax in his bill of costs travel and a term fee at each term while the case is before an auditor; *Swasey* v. *Wixon*, 287; or held under advisement by the court. *Bliss* v. *Tripp*, 287.

2. A trespass committed under a claim of right is not a casual and involuntary trespass, upon tendering sufficient amends for which the trespasser, if afterwards sued, may recover costs under the Rev. Sts. *c.* 105, § 12. *Viall* v. *Carpenter*, 285.

3. Under the Rev. Sts. *c.* 24, § 38, parties who have entered into a recognizance to pay the costs of proceedings upon a petition to county commissioners for a jury to assess damages occasioned by the laying out of a town way, if the verdict shall be adverse to the petitioner, are liable for costs if the amount of damages allowed to the petitioner by the selectmen is not increased by the jury. *Hamblin* v. *County Commissioners*, 256.

4. In a suit in equity to redeem land from a mortgage, if the mortgagee in possession, on demand, renders an untrue account, the court may order him to pay the plaintiff's costs, under the Rev. Sts. *c.* 107, § 19. *Montague* v. *Phillips*, 566.

COUNTY.

See POOR DEBTORS, 1.

COUNTY COMMISSIONERS.

1. An assessment of damages, signed by a majority of the county commissioners, after a hearing by the whole board, is valid. *Inhabitants of Plymouth* v. *County Commissioners*, 341.

2. County commissioners cannot be allowed to file separate answers to a petition for a writ of *certiorari* to quash proceedings of their board. *Ib.*

3. A notice, ordered by the county commissioners to parties who have entered into a recognizance for the costs of the proceedings upon an application for a jury to assess damages sustained by the laying out of a town way, to show cause why a warrant of distress should not issue, and served by copy as directed, is sufficient, although the copies served are not attested by any officer. *Hamblin* v. *County Commissioners*, 256.

4. The county commissioners have no authority to issue a warrant of distress

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to compel the payment by the town of Plymouth of damages assessed for the taking of land, water or water power for the construction of water-works under *St.* 1855, *c.* 61. *Russell Mills* v. *County Commissioners*, 347.

See BRIDGE, 1; CERTIORARI; CONTRACT, 11; COSTS, 3; RAILROAD, 7; TAX, 3, 4; WAY, 1, 2, 4.

COURTS.

See APPEAL; EXECUTOR AND ADMINISTRATOR, 4; INDICTMENT, 6; JUDGMENT, 2; VERDICT, 3.

COVENANT.

In a deed of all the grantor's "right and title to one undivided third part of" land bounded and described, covenants that he is seised in fee of the granted premises, that they are free from all incumbrances, and that he will warrant them to the grantee against the lawful claims of all persons, are limited in effect by the description of the subject granted; and are not broken by an eviction of the grantee under an incumbrance previously created by the grantor. *Hoxie* v. *Finney*, 332.

See DAMAGES, 2; ESTOPPEL; EVIDENCE, 4.

CUSTOM.

See EVIDENCE, 17; INSURANCE, 7, 8, 11, 13, 16.

DAMAGES.

1. In an action brought by the defendant in replevin against the officer who served the writ, for taking an informal bond, by reason of which the replevin was dismissed on the defendant's motion, the officer may show in mitigation of damages that the property replevied was, at the time of the service of the replevin, and has since remained the property and in possession of the plaintiff in replevin. *Case* v. *Babbitt*, 278.
2. In an action on the covenant against incumbrances, to recover the value of a right of dower not released in the deed under which the defendant derived his title, and since purchased by the plaintiff, the plaintiff introduced evidence of the amount paid by him therefor, and of the value of the land, independently of the buildings, at that time. *Held*, that the defendant might introduce evidence of the increase in value of the land by buildings and other improvements since the deed under which he derived his title. *Sturtevant* v. *Phelps*, 50.
3. In an action for the breach of a contract in writing, by which the defendant agreed to cover the roof of the plaintiff's building, and to warrant the same to stand well and resist the water and make a tight roof for the term of five years, and in default thereof to make the same same satisfactory to the plaintiff, the plaintiff can recover no damages for injury to the interior of his building or to articles stored there, caused by water leaking through the

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roof constructed by the defendant; but only the cost of having the roof put into a satisfactory condition. *Goddard* v. *Barnard*, 205.

See ASSAULT AND BATTERY, 1; CERTIORARI; COUNTY COMMISSIONERS; EMINENT DOMAIN, 3, 4; FRAUD; INSURANCE, 12, 14; MILL; RAILROAD, 6, 7.

DECEIT.

See FRAUD.

DECLARATION.

See PLEADING, II.

DEED.

1. A quitclaim deed of land, bounding it by the land of A., conveys all the grantor's title up to the true boundary of A.'s land, and is not void as to land belonging to the grantor, but held adversely by A. at the time of the conveyance, in consequence of an erroneous location of the division fence. *Sparhawk* v. *Bagg*, 583.
2. A deed by a tenant in common of a certain number of acres in a tract of land described as undivided, in which his share equals a larger number of acres, is a valid conveyance of the specified proportion of the whole tract. *Small* v. *Jenkins*, 155.
3. A deed not acknowledged or recorded is no evidence of seisin or possession in the grantee, except against the grantor and his heirs. *Kellogg* v. *Loomis*, 48.

See CONDITION; COVENANT; DAMAGES, 2; EQUITY, 2; ESTOPPEL; EVIDENCE, 4, 13; HOMESTEAD, 2 – 5; WAY, 14 – 16.

DELIVERY.

See CARRIER; CONTRACT, 10; GIFT; SALE, 1, 2.

DEMAND.

See BOND, 2; PROMISSORY NOTE, 15, 16.

DEMURRER.

See PLEADING, 9.

DEPOSITION.

See TRUSTEE PROCESS, 2.

DEVIATION.

See INSURANCE, 11.

DEVISE.

See WILL.

DISSEISIN.

See DEED, 1.

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DISTRESS.

See County Commissioners, 3, 4; Replevin.

DISTRICT ATTORNEY.

See Information; Witness, 5.

DOG.

1. The fact that a man applied for a license to keep a dog is competent evidence that he was the owner or keeper of the dog, on the trial of a complaint against him for keeping a dog without a license. *Commonwealth* v. *Gorman*, 601.
2. The owner of sheep or lambs, suffering loss by reason of the worrying, maiming or killing thereof by dogs, cannot maintain an action, either of contract or of tort, against the town in which they are kept, for the omission, neglect or refusal of the selectmen to draw an order in his favor upon the town treasurer for the amount of his loss, under *St.* 1859, *c.* 225, § 6, especially if he does not allege in his declaration that he produced to the selectmen sufficient proof of his loss to establish his right to such an order. *Chenery* v. *Inhabitants of Holden*, 125.

DOMICIL.

See Husband and Wife, 3; Tax, 1.

DONATIO CAUSA MORTIS.

See Gift.

DOWER.

See Estoppel, 1.

DURESS.

See Sale, 5.

EASEMENT.

See Way, 14–16.

EMINENT DOMAIN.

1. The determination of the legislature is not conclusive that a purpose for which it directs private property to be taken is a public use; but is conclusive, if the use is public, that a necessity exists which requires the property to be taken. *Talbot* v. *Hudson*, 417.
2. In order to constitute a public use which will justify the taking of private property, it is not essential that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the purpose for which the property is appropriated. *Ib.*
3. A statute, providing that a large tract of land, situated in different towns and owned by a large number of persons, and overflowed by means of a

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dam, may be redeemed by the removal of the dam by public officers, and compensation paid out of the treasury of the Commonwealth to persons whose property is thereby injured, is a constitutional exercise of the power of taking private property for public uses. *Ib.*

4. In a statute taking private property for public uses, a provision for the assessment of damages to the owners thereof, and the payment of the same by warrant from the governor out of the treasury of the Commonwealth, is a sufficient provision for the compensation of the owners of the property taken, although the Commonwealth is not liable to be sued. *Ib.*

See CERTIORARI, 2, 3.

EQUITY.

1. The representation of a dramatic work, which the proprietor has no copyright of, and has previously caused to be represented and exhibited for money, is no violation of any right of property, although made without license of the proprietor; and, if not shown to have been in violation of any contract or trust, cannot be restrained by injunction. *Keene* v. *Kimball*, 545.

2. A restriction, in a deed of one of several messuages from the owner of all, that the granted premises are conveyed "subject to the following restriction, that no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon," does not so appear to have been inserted for the benefit of one of the adjoining messuages that it will be enforced in equity at the suit of a subsequent grantee thereof by deed containing no express mention of the restriction. *Badger* v. *Boardman*, 559.

3. Under the Rev. Sts. *c.* 81, § 8, this court did not have jurisdiction in equity to compel the specific performance of an oral agreement concerning land, even after partial performance thereof. *Buck* v. *Dowley*, 555.

4. The general jurisdiction in equity conferred on this court by the *St.* of 1857, *c.* 214, cannot be exercised on a bill filed before its passage. *Ib.*

5. A bill in equity, filed before the *St.* of 1857, *c.* 214, alleged that the parties made an oral agreement that the defendant should advance the requisite money to purchase a tract of land and build warehouses thereon, in consideration that the defendant should be paid from the proceeds all the money so advanced by him, with interest, and five per cent. commission for the use and advancement of the money; that, for greater security, a deed of the land was made to the defendant, which, although absolute on its face, conveyed the land to him as security for the money to be so advanced, and in trust for the plaintiff; that warehouses were erected on the land with money so advanced by the defendant, and money advanced by the plaintiff; that portions of the property were sold, and the proceeds received by the defendant; and that a part of the property remained unsold; and prayed for a conveyance of this part of the property, and for an account. The answer denied the allegations in the bill; and averred that the actual agreement was, that a partnership of which the defendant was a member should ad-

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vance the money, and receive from the proceeds the amount advanced, with interest, and five per cent. commission for advancement, and six per cent. commission on all amounts received by them therefrom; and that the surplus, if any, should be paid to the plaintiff; and averred performance of the agreement on the part of the defendant and his partner. *Held*, that this agreement did not constitute a partnership between the parties; that it could not be enforced as a trust, nor as a case of constructive fraud; and that the plaintiff could not, without amending his bill, avail himself of the agreement admitted in the answer. *Ib.*

6. A parish obtained a subscription to build a meeting-house, to be repaid out of the proceeds of the sales of pews, and appointed five persons a building committee, who accepted the trust, and built the meeting-house, and one of them was appointed treasurer and kept accounts of the business of the committee. Before the building was completed, two of the committee ceased to act, and the business was assumed and carried on by the three other members. The cost of the building exceeded the amount subscribed, and the committee were left in debt for the excess, and by agreement with the subscribers and the parish, and for their own indemnity, had the management of the unsold pews, and paid or settled with the subscribers. One of the acting members of the committee paid a certain sum to the treasurer, to be applied towards paying a debt of the committee. The treasurer afterwards received from the sales and rent of pews and other sources an amount sufficient, after discharging all expenses of the business of the committee, to repay this sum and interest. Neither the third active member of the committee nor the parish made any claim to the surplus. *Held*, that the member of the committee who paid this sum might maintain a bill in equity against the treasurer; but must make the parish and the three other members of the committee parties to the bill. *Foster* v. *Bryant*, 190.

7. Upon a bill in equity filed by ten taxpayers of a town, residing in a school district unlawfully created by a vote of the town to unite two previously existing lawful school districts, this court will restrain the assessors of the town from assessing a school district tax in pursuance of a vote passed at a meeting of such unlawful district, a person elected clerk of such unlawful district from doing any act as such clerk, and a person elected treasurer of such unlawful district from paying out money obtained by a sale of the schoolhouses belonging to the two previously established districts; although the bill is not filed till more than thirteen months after the vote of the town to unite the two districts, and, in the mean time, in pursuance of votes at meetings of the consolidated school districts, a school district tax has been asesssed upon and collected of the taxpayers residing in it, against the written protest of some of them, and the schoolhouses of the two districts previously existing have been sold. *Holmes* v. *Baker*, 259.

See CONTRACT, 2; COSTS, 4; EQUITY PLEADING; HUSBAND AND WIFE, 1; INFORMATION; MANUFACTURING CORPORATION, 4; MORTGAGE, 4; NUISANCE, 3.

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EQUITY PLEADING.

1. Under the *St.* of 1856, *c.* 38, § 2, a suit in equity to enforce the execution of a trust might be begun by a bill inserted in a writ of attachment, according to the Rev. Sts. *c.* 90, § 117. *Crane* v. *Adams*, 542.

2. No hearing can be had upon a bill in equity, founded upon articles of copartnership, and naming all the partners as defendants, if the return upon the subpœna does not show that all the defendants residing within the Commonwealth have been duly summoned to answer the bill, although those defendants who have been summoned have appeared and demurred thereto. *Homer* v. *Abbe*, 543.

3. After judgment for the plaintiff for damages and costs in a suit in equity for the obstruction of a way, the defendant cannot upon his own motion have the case referred to a master to ascertain the limits of the plaintiff's right of way. *Barnes* v. *Haynes*, 34.

4. After a suit in equity has been referred to a master, and heard and reserved on his report, presenting questions of law only, for the consideration of the full court, it is too late to apply to have issues of fact framed for trial by jury. *Shaw* v. *Norfolk County Railroad*, 407.

See EQUITY, 5, 6.

ESTATES OF DECEASED PERSONS.

See EXECUTOR AND ADMINISTRATOR; INSOLVENT ESTATES.

ESTOPPEL.

1. A party to an indenture of partition, containing a full and accurate description of the land, and a recital that it has been set off to a widow as dower, is not thereby estopped to show that land held by him under a lease from the widow of all the premises set off to her as dower is different land. *Doane* v. *Willcutt*, 368.

2. A quitclaim deed, securing to the grantor a right to use a way over the land granted for a certain purpose, and with a covenant of warranty against all persons claiming by or under the grantor, does not estop him to use the way for other purposes, if it had previously been legally laid out by the selectmen and accepted by the town as a private way. *Flagg* v. *Flagg*, 175.

See ACTION, 4.

EVIDENCE.

1. If the evidence offered at the trial is sufficient to support the allegations in the indictment, the presumption is that the offence proved is that charged; and an immaterial variance in time will not authorize the jury to find them not to be the same. *Commonwealth* v. *Maloney*, 20.

2. In an action to enforce a contract for the sale of goods, the only legal evidence of which is an entry in the books of a broker employed to make this single contract, parol evidence is not competent to show that the contract thus stated, if within the broker's authority, was different from the contract actually made through him; but is admissible to show that the contract as

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thus reduced to writing differs from that which the broker was authorized to make. *Coddington* v. *Goddard*, 436.

3. In an action on a written agreement to pay a sum of money, evidence is inadmissible to show a previous oral agreement that the defendant should be allowed to deduct a sum of money then due from the plaintiff to him from the next amount which should become due from him to the plaintiff. *Wright* v. *Smith*, 499.

4. Proof of an oral agreement made between the grantor and grantee, after the delivery of a deed containing covenants of warranty against all incumbrances, concerning the removal of certain existing incumbrances, is not incompetent as tending to contradict the deed. *Small* v *Jenkins*, 155.

5 In an action on a promissory note purporting to be made by two persons, one of whom contests his liability on the ground that his name was fraudulently placed upon the note after it came into the possession of the plaintiff, the plaintiff may introduce evidence that before discounting the note, and in the absence of the defendants, he inquired of another person concerning the pecuniary responsibility of both the alleged makers, and was informed that the one whose signature is in controversy was good and the other unfit to be trusted; but not that at the same conversation the plaintiff said that he was to have the name of this defendant upon the note. *Marcy* v. *Barnes*, 161.

6. Upon the issue of the genuineness of a signature, magnified photographic copies of this signature, and of admitted genuine signatures of the same person, are admissible in evidence, accompanied by competent preliminary proof that the copies are accurate in all respects except as to size and coloring. *Ib.*

7. A photographer, who is accustomed to examine handwriting in connection with his business, with a view to detect forgeries, is qualified to give an opinion, as an expert, as to the genuineness of a disputed signature; even if his opinion is based in part on enlarged photographic copies made by himself of the disputed signature and of admitted genuine signatures of the same person, which he testifies are accurate copies except as to size and color. *Ib.*

8. Upon the issue of the seaworthiness of a vessel at a certain time, the question whether a vessel would be seaworthy with pumps in the condition in which hers were found to be on the completion of her voyage some months afterwards is immaterial. *Parsons* v. *Manufacturers' Ins. Co.* 463.

9. A paper stating the repairs made on a vessel, and her condition at the time of the repairs, signed but not written by a shipbuilder's foreman, who testifies that from seeing his signature to it he believes and has no doubt that the facts were as there stated, but that he has no recollection of the facts or of having signed it, is not competent evidence of the facts stated therein. *Ib.*

10. At the trial of an action on a policy of insurance on a vessel, the master of the vessel may be asked what caused the vessel to leak, whether as a matter of opinion or of fact. *Ib.*

11. Upon the issue of the settlement of a pauper, depending upon the question

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whether his father was born before or after the marriage of his parents, the date of which is not disputed and was more than fifty years ago; and after a witness has testified to having seen the pauper's father during the life of a person who died in the year preceding that of the marriage, and who was a stranger in blood to the pauper's family; a parchment kept framed and hanging in a conspicuous place in the house occupied by the family of the deceased, containing a record of the dates of births, marriages and deaths of various members of the family, for a long series of years, including the date of the death in question, and handed down by the father to a brother of the deceased as containing a true statement of the events recorded on it, is admissible in evidence; as is also proof of the inscription on a gravestone in the family burial-ground, bearing the name and the date of the death of the deceased. *Inhabitants of North Brookfield* v. *Inhabitants of Warren*, 171.

12. In an action of slander, the good faith and want of malice of the defendant, when material, may be proved by his own testimony. *Smith* v. *Higgins*, 251.

13. In an action for trespass upon land, the plaintiff traced his title to two persons as tenants in common, and gave in evidence a deed of partition of the premises between them, in which a third person was named as a former owner. *Held*, that a previous deed of the premises to that person, and acts of ownership exercised by him, were inadmissible in evidence for the defendant, in the absence of proof of any privity of title between that person and the tenants in common. *Doane* v. *Willcutt*, 368.

14. In a controversy between two persons concerning the title to personal property, conversations between one of them and third persons, who are referred by the other to him as the owner, are not admissible in his favor. *Beecher* v. *Mayall*, 376.

15. In an action upon an oral contract of insurance, the defendant's book of entries of risks taken, in which the alleged contract is not entered, is inadmissible to prove that there was no contract. *Sanborn* v. *Fireman's Ins. Co.* 448.

16. The records of a corporation, showing the election at their annual meeting of a certain person as a director, and his presence and making motions at a subsequent meeting of the directors, are not conclusive evidence against him that he accepted the office. *Blake* v. *Bayley*, 531.

17. In an action on an agreement made by the seller to pay a commission on the contract made by him with a buyer to a person who brought them together, but took no part as agent for either in the making of the contract, evidence to prove a usage among brokers, as to the time when a commission is to be considered as earned, is inadmissible. *Rupp* v. *Sampson*, 398.

See ASSAULT AND BATTERY; AUDITOR; BASTARDY PROCESS; CONTRACT, 4, 7, 9, 11; DAMAGES; DOG, 1; EXCEPTIONS, 2–4; EXECUTOR AND ADMINISTRATOR, 1; FOREIGN INSURANCE COMPANY; GIFT; INSURANCE, 1, 4, 7, 8, 13, 16; MALICIOUS PROSECUTION; MORTGAGE, 4; MURDER, 3; NUISANCE, 3, 6, 7; PARTNERSHIP; PAUPER, 2; PLEADING, 7; PROMISSORY NOTE, 1, 3, 5, 6, 9, 10; SPIRITUOUS AND INTOXICATING LIQUORS, 1–7; TAX, 3; TRUSTEE PROCESS, 2; VERDICT, 3; WAY, 9, 10, 15; WILL, 1; WITNESS, 2, 4, 5.

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EXCEPTIONS.

1. The refusal to dismiss a complaint on motion for insufficiency in the description of the offence is not a subject of exception. *Commonwealth* v. *Gorman*, 601.
2. When the evidence offered by the plaintiff is not sufficient to maintain the action, he has no ground of exception to the admission of incompetent evidence offered by the defendant. *Bliss* v. *Clark*, 60.
3. When a bill of exceptions shows that the prevailing party at the trial put in a deed, which by its true construction is conclusive in his favor, the admission of oral evidence of subsequent acts is immaterial and no ground of exception. *Stetson* v. *Dow*, 372.
4. Exceptions cannot be sustained to the admission in evidence of the declarations of a defendant charged with unlawfully selling intoxicating liquors, that he owned the land, leased the building, and kept the establishment in which it is contended that he committed the offence, if the bill of exceptions does not show whether there was or was not other testimony tending to connect him with the acts charged. *Commonwealth* v. *Collins*, 29.

See APPEAL, 2; MORTGAGE, 6; PLEADING, 8; PROMISSORY NOTE, 16; SPIRITUOUS AND INTOXICATING LIQUORS, 8; TRUSTEE PROCESS, 2.

EXECUTION.

Under *St.* 1852, *c.* 256, an officer's return of the levy of an execution, which states that he appointed an appraiser for the debtor, "he being absent from the Commonwealth and not a resident therein, and having no agent or attorney known to said officer," shows a sufficient reason for such appointment, without also stating that the debtor had neglected to appoint an appraiser. *Randall* v. *Wyman*, 334.

See ATTACHMENT; MANUFACTURING CORPORATION; POOR DEBTORS, 2.

EXECUTOR AND ADMINISTRATOR.

1. The giving of notice of the appointment of an executor or administrator, required by the Rev. Sts. *c.* 66, in order to make the period of limitation of actions of creditors against him begin to run from the time of his giving bond, may be proved by other evidence, as well as by an affidavit filed in the probate office. *Estes* v. *Wilkes*, 363.
2. An administrator, who, before the death of his intestate, contracted with him for the purchase of certain real estate at a price agreed upon, took a bond for a conveyance upon payment of the purchase money, and caused it to be recorded, entered into possession, and made from time to time payments on account of interest and principal of the purchase money, has included in his inventory of the estate of the deceased the amount of the agreed price and interest remaining unpaid, and to whom the heirs are ready to convey on payment thereof, is bound to charge himself with such amount in his administration account. *Chenery* v. *Davis*, 89.
3. If an administrator, who has been licensed to sell more of the real estate of his intestate than is necessary for the payment of debts, and has given a

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special bond as required by the Rev. Sts. c. 71, § 6, to account for the surplus proceeds, is also guardian of the heirs at law of his intestate, who are all minors, and expends such surplus proceeds for the maintenance of his wards, it is his duty, in his administration account, to charge himself with such proceeds, and credit himself with the sums expended for his wards as paid to himself as guardian; and if he neglects to render such account of the surplus proceeds in the probate court, he and his sureties on the special bond are liable in an action thereon for such surplus proceeds, deducting so much thereof as may be allowed to him in the settlement of his guardianship account in the probate court, as properly expended for the maintenance of his wards; and if he has rendered no account as guardian, an opportunity will be afforded to him to do so after judgment for the penalty of the bond. *Bennett* v. *Overing*, 267.

4. Under the Rev. Sts. c 70, § 10, an action may be brought in this court upon a special bond given under c. 71, § 6, by an administrator, licensed to sell more real estate than is necessary for the payment of debts, to account for the proceeds. *Ib.*

5. Upon a special bond given under the Rev. Sts. c. 71, § 6, by an administrator licensed to sell more real estate than is necessary for the payment of debts, to account for the surplus proceeds, an action will lie after neglect for an unreasonable time to render such an account in the probate court, although he has not been cited to do so. *Ib.*

See APPEAL, 3; INSOLVENT ESTATES; MILL, 4; RAILROAD, 7; TRUST, 2.

EXPERT.

See EVIDENCE, 7, 10.

FIELD-DRIVER.

A field-driver, who takes oxen going at large in a public highway without a keeper, with the intention of driving them to the town pound, and, before driving them to the pound, drives them into his own yard, goes a third of a mile to find the owner, and, having found him, says to him, "I have taken two of your oxen and put them in my yard, and if you don't come after them, I shall drive them to the pound," is not liable to the owner for a conversion of the cattle. *Dean* v. *Lindsey*, 264.

See ASSAULT AND BATTERY, 2.

FIRE DEPARTMENT.

See TOWN, 3.

FIRE INSURANCE.

See INSURANCE, I.

FISHERY.

The *St.* of 1856, c. 50, empowering the mayor and aldermen of any city, and the selectmen of any town, lying upon the tide waters of the Commonwealth,

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to license any person to construct fish weirs in such waters within its limits, provided such weirs cause no obstruction to navigation nor encroach on the rights of others, does not affect the fisheries in Taunton Great River, regulated by *St.* 1855, *c.* 401. *Hathaway* v. *Thomas*, 290.

See PLEADING, 2.

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FOREIGN INSURANCE COMPANY.

In an action by a foreign mutual insurance company to recover assessments upon a deposit note, if the answer denies that the plaintiffs' agent deposited with the treasurer of the Commonwealth a copy of their charter, as required by the Rev. Sts. *c.* 37, § 41, before the execution of the policy which was the consideration of the note, the burden is upon the company to prove a compliance with the statute, and is not sustained by a certificate of the treasurer that such a copy was deposited with him in a certain year, without showing that it was before the day of the date of the note. *Washington County Mutual Ins. Co.* v. *Chamberlain*, 165.

FOREIGN LAW.

See WILL, 3.

FRAUD.

Two owners of a vessel are jointly liable in an action of deceit for fraudulent representations made by one of them, acting for both, in a sale of the vessel; and the damages are not limited to the profit derived by them, or either of them, from the fraud. *White* v. *Sawyer*, 586.

See BANK, 2; COMMISSIONS; CONSPIRACY; CONTRACT, 4; EQUITY, 5.

FRAUDS, STATUTE OF.

1. An oral contract of insurance for one year including its date is a contract to be performed within a year, and therefore not within the statute of frauds. *Sanborn* v. *Fireman's Ins. Co.* 448.
2. An entry of a contract of sale and purchase, made by a broker in his books, in the regular course of his business, which states the date, the full names of both parties, connected by the word "to" in this form, "W. W. G. to T. B. C. & Co," a description of the goods sold, and the terms of the bargain, although not subscribed by any one, is a sufficient memorandum in writing, within the statute of frauds. *Coddington* v. *Goddard*, 436.

See CONTRACT, 5, 9; PROMISSORY NOTE, 2.

FREIGHT.

It seems, that under a bill of lading, otherwise in the usual form, but having upon its face these clauses: "Goods to be received at the ship's tackles, when ready for delivery; freight payable before delivery, if required;" not

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merely safe arrival and notice thereof to the consignee, but reasonable time to enable him to receive his goods at the ship's tackles, is necessary to the earning of freight. *Fay* v. *Alliance Ins. Co.* 455.

See INSURANCE, 12 – 16.

GIFT.

The delivery of the property, necessary to the validity of a gift *causa mortis*, cannot be proved by subsequent declarations of the deceased, shortly before death, to a person not connected with the gift. *Rockwood* v. *Wiggin*, 402.

GUARANTY.

A guaranty of payment for goods to be supplied to two partners is discharged by an arrangement between them and the creditor, by which, before payment for goods so supplied, one of the partners goes out of the business, and the other gives his individual note, payable to the creditor and another person jointly, and no demand of payment is made on the outgoing partner. *Bill* v. *Barker*, 62.

See CONTRACT, 8, 9; PROMISSORY NOTE, 7

GUARDIAN AND WARD.

A husband, who for seven years has lived in a house belonging to his wife and her three children by a former marriage, has been appointed guardian of the children and kept them in the house with himself and their mother, has no property of his own, has only earned enough during the time to support the united family, and has sold the real estate of his wards by leave of court, is not to be charged in his guardian's account with any previous rent thereof, or credited with sums paid for taxes thereon, or for the board and clothing of his wards, but may be allowed a reasonable amount paid for the expenses of one of the wards at a boarding school. *Mulhern* v. *McDavitt*, 404.

See EXECUTOR AND ADMINISTRATOR, 3.

HANDWRITING.

SEE EVIDENCE, 6, 7.

HIGHWAY.

See WAY.

HOMESTEAD.

1. The use by the owner of a tract of land two miles and a half from his homestead farm, in connection with that farm, for pasturing cattle of himself and others, is not sufficient to exempt it from execution as part of his homestead. *Adams* v. *Jenkins*, 146.

2. A deed executed while the *St.* of 1855, *c.* 238, was in force, executed by the grantor's wife, and containing a release of dower, but no express release of any right of homestead, and purporting to convey by metes and bounds the grantor's "homestead farm," in fact consisting of various enclosed fields situated on both sides of a road, and having upon it one dwelling-house,

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worth more than eight hundred dollars, occupied by the grantor and his family, and another house of much less value occupied by a man in his employ, was not executed as required by that statute to convey any part of the farm. *Ib.*

3. A deed of land exempted as a homestead, in which the grantor's wife did not join as required by the *St.* of 1855, *c.* 238, is void as against a subsequent deed from the grantor in which she duly joined before the *St.* of 1857, *c.* 298, § 13, confirmed the first deed, although the second deed excepts from the covenant against incumbrances the claims, if any, of the first grantee. *Ib.*
4. The *St.* of 1857, *c.* 298, § 13, confirming titles to real estate, in which the wife of the grantor failed to join in releasing the right of homestead, is constitutional and valid as against the grantor. *Johnson* v. *Fay*, 144.
5. The exception in the *St.* of 1857, *c.* 298, § 13, of rights acquired "prior to the passage of this act," does not include rights acquired after its approval by the governor and before it took effeet. *Ib.*

See PRINCIPAL AND SURETY; PROMISSORY NOTE, 3.

HOMICIDE.

See MURDER.

HORSE RAILROAD.

See NUISANCE, 3, 4.

HUSBAND AND WIFE.

1. A husband who has entered into an agreement with his wife for a separation, and given a bond to a third person to secure the performance by him of the award of arbitrators appointed to determine "what allowance shall be made and paid by him to his wife by way of alimony for her support and maintenance during the existence of the coverture between them," which has since been fixed by their award at a certain sum payable quarterly, to be disposed of by the wife for the maintenance of herself and her daughters, "or otherwise as if she were a feme sole," cannot, after the death of his wife, maintain a bill in equity to restrain the obligee in the bond or his representatives from prosecuting a suit at law to recover arrears of such allowance, without alleging that she made no disposition of her property by will, and *broono* person has any legal or equitable claim upon her property. *Hol-*
2. Person*Comstock*, 109.
removing roperty bought in another state by a woman married there and *c.* 249, out of this state with her husband before the passage of *St.* 1857, and never reduproceeds of notes owned by her at the time of her marriage, acquired in like nto possession by her husband; as well as personal property and personal propaner in this state before the passage of the same statute; in part by an exchv acquired in this state after the passage of the statute, stated, and in part bge of property acquired in the other state as before notes; is liable to atta payment of money out of the proceeds of the same
:hment in this state for the debts of her husband, in

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the absence of evidence of any law of the state in which the marriage took place, adding to the rights of married women at common law to hold personal property. *Coombs* v. *Read*, 271.

3. The *St.* of 1855, *c.* 304, § 1, providing that the real and personal property of "any woman who may hereafter be married in this commonwealth," and its rents, issues and profits, shall remain her sole and separate property, applies to the case of a woman who, with her husband, have their domicil in this commonwealth at the time of their marriage, although the marriage is solemnized in another state; and satisfies a condition in a will, giving property to her upon condition that it shall not be sold, transferred or improved until the principal and income are secured to her sole use and benefit. *Woodbury* v. *Freeland*, 105.

See GUARDIAN AND WARD; MORTGAGE, 2; PARENT AND CHILD; SPIRITUOUS AND INTOXICATING LIQUORS, 7; WILL, 3; WITNESS, 3, 4.

IMPOUNDING CATTLE.

See FIELD-DRIVER.

INDICTMENT.

1. Interlineations in an indictment, and the use of the abbreviation "sd" for "said," are no ground for arresting judgment. *Commonwealth* v. *Desmarteau*, 1.

2. An indictment for a murder at Chicopee is not bad for describing it at "Chickopee." *Ib.*

3. In an indictment for murder, the person murdered may be described by the name by which he is commonly called and known, although differing from his name of baptism. *Ib.*

4. An indictment for murder by bruises and wounds of a person described throughout as Augustine, except in alleging that of said bruises and wounds "the said Augustina died," is not bad after verdict. *Ib.*

5. An indictment for murder, which, after describing the mode of the commission of the crime, introduces the legal conclusion by the words "and so the jurors" say, is not bad for argumentativeness. *Ib.*

6. An indictment may be presented and conviction had in the superior court since the General Statutes took effect for an assault and battery committed before. *Commonwealth* v. *Bradley*, 241.

7. A defendant who has been tried on two counts in an indictment before a jury, who have disagreed, may be put on trial on another count of the same indictment, before the same jury, at the same term of court. *Commonwealth* v. *Burke*, 32.

See ABORTION; COMPLAINT; CONSPIRACY; EVIDENCE, 1; LARCENY; MURDER, 3, 4; NUISANCE, 1, 2, 5, 7; VERDICT, 1.

INFANT.

See GUARDIAN AND WARD; PARENT AND CHILD.

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INFORMATION.

The erection or continuance of a public nuisance may be restrained upon an information in equity by the attorney general or other law officer of the Commonwealth, either *ex officio* or upon the relation of a private person. *District Attorney* v. *Lynn & Boston Railroad*, 242. *Attorney General* v. *City of Cambridge*, 247.

INJUNCTION.

See EQUITY, 1, 2, 7; INFORMATION; NUISANCE, 3, 4.

INSOLVENT DEBTORS.

1. A creditor of an insolvent debtor, who has proved his claim in insolvency, has no right in his own name to contest the claims of other creditors. *Freeland* v. *Mechanics' Bank*, 137.
2. A certificate of discharge in insolvency is a bar to an action on a debt due to one who had notice of the proceedings, although he did not prove his debt against the estate, and although the certificate was granted, by consent of a majority of the creditors who had proved their debts, two days before the expiration of six months from the date of the assignment. *Wetherbee* v. *Martin*, 518.

See APPEAL, 2; PROMISSORY NOTE, 7.

INSOLVENT ESTATES.

1. Upon the petition of a creditor, filed after the expiration and return of a commission to examine claims against an insolvent estate, alleging a contingent claim against the estate and praying the reservation in the hands of the administrator of a sum sufficient to pay to the petitioner a dividend equal to that which should be paid to other creditors, an order, passed without notice by the judge of probate, directing the administrator to retain the whole balance of the estate in his hands for this purpose, is no bar to a subsequent petition for distribution, filed by creditors whose claims the commissioners have allowed, nor to an inquiry, upon such petition, into the merits of the alleged contingent claim. *French* v. *Hayward*, 512.
2. The possible liability of surviving partners of a deceased insolvent debtor to be compelled by pending actions at law to pay notes and obligations given by him in the name of the firm, without their knowledge or consent, for his private use, does not give them a contingent claim against his estate, within the meaning of the Rev. Sts. *c.* 68, § 5, upon which the judge of probate, in ordering a dividend among creditors who have proved their claims before commissioners against the estate of the debtor, may leave in the hands of the administrator a sum sufficient to pay a dividend equal to that paid to the other creditors. *Ib.*

INSURANCE.

I. *Fire Insurance.*

1 contract of insurance need not be in writing. *Sanborn* v. *Fireman's Ins.* 448.

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2. An insurance company authorized by their charter "in their name and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct," to make contracts of insurance, have authority to make an oral contract of insurance. *Ib.*

3. The agent of an insurance company, authorized by them "to effect fire insurance upon buildings, goods, wares and merchandise, and for this purpose to survey risks, fix the rate of premium, and issue policies of insurance signed by the president, attested by the secretary, and countersigned" by himself, has authority to make an oral contract of insurance. *Ib.*

4. In an action upon an oral contract of insurance, the plaintiff's agent testified that he prepared a general application, and left it at the office of the defendants' agent, and the clerk of the latter came to him and said that he would take two thirds of the risk and allow a certain commission; that the plaintiff's agent went to the defendants' agent, and the amount, rate and time of insurance were agreed upon between them; that the two agents had running accounts with each other and settled once a month; that the same afternoon the property was destroyed by fire, and the defendants' agent called upon the plaintiff's agent and said he did not consider the risk completed. *Held*, that there was evidence for the jury of a contract of insurance, which began immediately. *Ib.*

5. A policy of insurance against fire, effected by a mortgagor out of possession, which by its terms is to cease and be of no effect if the premises insured shall be used for certain specified purposes, may be rendered void by the use of them for such purposes by a lessee of the mortgagee in possession. *Wetherell* v. *City Fire Ins. Co.* 276.

6. A policy of insurance against fire, containing a provision that it shall cease and be of no force or effect if the premises insured shall be appropriated, applied or used for the purpose of carrying on or exercising any trade, or of keeping or storing any article, denominated hazardous or extra-hazardous in the terms and conditions annexed to the policy, in which, among other things, "sailmakers" are denominated hazardous, and "confectionery and confectionery manufacturers" extra hazardous, is rendered void by a hiring of a portion of the building insured for a sail-loft, and carrying in a sailmaker's stock and tools, although without commencing work, and by the keeping of a small quantity of confectionery in glass jars on a counter or shelf in a room occupied as a barber's shop in the building insured. *Ib.*

7. A policy of insurance on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder;" founded on an application which is made a part thereof, which states the property to be "the stock in trade, consisting of groceries, provisions, and such goods as are usually kept in a country store, except dry goods;" and declaring that if certain articles denominated hazardous, extra-hazardous, and risks prohibited, enumerated therein, are kept in any premises insured, the policy shall be void, unless therein otherwise specially provided for; is not avoided by the keeping of some of these

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articles, if they are articles usually kept for sale in a "country store;" and parol evidence is admissible to prove this. *Whitmarsh* v. *Conway Fire Ins. Co.* 359.

8. Evidence is admissible of a well settled custom by which the words "store fixtures" in a policy of insurance are applied to all furniture and other articles in a shop or warehouse, necessary or convenient for use in the course of trade. *Ib.*

9. A by-law of an insurance company, providing that in case of loss the assured shall, as soon as possible, deliver a particular account in writing, under oath, stating the value of the property lost, and of that saved, is sufficiently complied with by a claim for a total loss of the property, stating its value, if some of the property is saved without his knowledge. *Harkins* v. *Quincy Mutual Fire Ins. Co.* 591.

See EVIDENCE, 15; FOREIGN INSURANCE COMPANY; FRAUDS, STATUTE OF, 1; RAILROAD, 6.

II. *Life Insurance.*

10. A policy of insurance, procured by a man on his own life, payable to himself and his executors, administrators and assigns, was assigned by him; while held by the assignee, became forfeited by failure of the assured to pay the premiums; was afterwards assigned by the assignee to a brother of the wife of the assured, and, with the consent of the assured and the insurers, renewed by her brother for her benefit; the premiums were subsequently paid by him as they accrued; and the amount of the policy was paid to him by the insurers upon the death of the assured. *Held*, that the administrator of the estate of the assured could maintain no action against him for any part of the money so received. *Winchester* v. *Stebbins*, 52.

III. *Marine Insurance.*

11. It is not a deviation for a vessel insured "at and from Callao to the Chincha Islands and from thence to New York," to return, after loading at the Chincha Islands with guano, to Callao for a clearance, if such is the usage of trade, and no clearance can be obtained at the Chincha Islands. *Parsons* v. *Manufacturers' Ins. Co.* 463.

12. Where a vessel is not so injured as to be incapable of performing her voyage, and the cargo remains capable of delivery *in specie* at the port of destination, there is no loss of freight for which insurers on freight are liable, except in case of general average. But where the cargo is so injured by perils of the sea as to become wholly worthless and incapable of being carried with safety to the vessel and the remaining cargo, and is therefore thrown overboard, there is a total loss of freight on that part. *Ib.*

13. A vessel laden with guano at the Chincha Islands, having stopped at Callao for a clearance, and then started on her homeward voyage, sprung a leak and put back to Callao in distress, when it was found that a part of the guano had been so damaged by sea water that it was utterly worthless and could not be kept on board with safety to the vessel, and, if it could have

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been landed, the cost of drying it would have been greater than its value when dried, and it was thrown overboard. The rest of the cargo was necessarily discharged in order to repair the vessel, a freight paid thereon, and it was transshipped by its owner into another vessel bound for a different port; and the first vessel, after being repaired, and by permission of the charterers, went back to the islands, and took in another cargo of guano under the original charter, which she delivered in safety at her port of destination. *Held*, that there was a total loss of freight of the guano thrown overboard, but no loss of freight on that transshipped. *Held, also*, that evidence that the course thus taken was the usual and prudent course for vessels in such a situation, and the testimony of an insurance broker that in adjustment of losses under these circumstances the usage had been to treat the voyage as one and the same, and the substituted cargo as if it were the original cargo landed and reshipped, and that before the date of the policy on the freight of this vessel he had adjusted losses in one case, and, he thought, in others, accordingly, were insufficient to prove a custom which could affect the rights of the parties; and that the going back to the islands, and taking in a cargo after the repairs of the vessel, must be treated as a new voyage and not as a resumption of the old one. *Ib.*

14. In the case of a partial loss of freight, one half of which is covered by a policy of insurance, and the value of which, mentioned in the policy, is less than the actual amount of the freight, the rule for the assessment of damages is the proportion of the valuation which the freight actually lost bears to the real value of the freight. *Fay* v. *Alliance Ins. Co.* 455.

15. A policy of insurance upon freight on a voyage to a port of discharge in Australia terminates at the first port at which cargo is discharged. *Ib.*

16. A policy of insurance was made upon the freight of a ship on a voyage "from New York to port of discharge in Australia." The ship arrived at Geelong in the bay of Port Philip, there discharged part of her cargo, destined to Geelong, afterwards proceeded to Hobson's Bay, which is an anchorage ground for the port of Melbourne, also within the bay of Port Philip, but twenty five miles from Geelong, and to which the rest of the cargo was destined, and was there destroyed with part of her cargo by fire. Upon the trial of an action for this loss of freight, it was proved that Geelong and Melbourne were legally two distinct ports, each having a custom-house, and with a coasting trade between them, and were largely known commercially as distinct ports, that distinct contracts were commonly made in reference to them, and that Port Philip was not a port of entry. The assured contended that the whole bay of Port Philip was treated by commercial usage as a single port of discharge, including Geelong, Hobson's Bay and Melbourne, as merely separate landing-places within it; and introduced evidence that at the time of loading the vessel the president of the insurance company was informed that she was to carry freight to Geelong, and said that no change in the policy was necessary, because she was insured to a port in Australia, Port Philip was the port intended, and Geelong was one of the landing-places in Port Philip; and also evidence that when shipments were made

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designed for Geelong or Melbourne, Port Philip was used as a more general and comprehensive term, in the same way as Australia or a port in Australia was used, without indicating the particular port; that some policies of insurance had been made to Port Philip, and that charter parties and bills of lading had been made in which Port Philip was named as a port of destination. But it did not appear that uniformly or usually these contracts were made in reference to more than one of the ports within the bay; or that before the making of the policy in suit there had ever been a loss adjusted under a policy of insurance, in which the question arose whether Port Philip was commercially regarded as a single port, or any policy made upon which such a question arose afterwards. *Held*, that there was no evidence of such a distinct, well settled and uniform usage as would maintain the action. *Ib.*

See EVIDENCE, 8, 10.

INTEREST.

See BANK, 1; RAILROAD, 3, 5.

INTOXICATING LIQUORS.

See SPIRITUOUS AND INTOXICATING LIQUORS.

JAILER.

See MANDAMUS.

JOINDER OF PARTIES.

See FRAUD; PLEADING, 1.

JOINT DEBTORS.

See JUDGMENT, 1.

JOINT TENANTS.

See WILL, 6.

JUDGMENT.

1. Under the Rev. Sts. *c.* 92, §§ 12, 13, and Gen. Sts. *c.* 126, §§ 13, 14, a judgment recovered in another state against joint contractors, one of whom was not served with process and did not appear, is no bar to an action against him in this commonwealth on the original contract. *Odom* v. *Denny*, 114.
2. A judgment of the circuit court of the United States in a district without this commonwealth, upon a writ of *scire facias* sued out upon its own judgment in an action in which the defendant, a citizen of this commonwealth, was served with process in that district and appeared, is valid, and will support an action in this commonwealth, if the defendant had actual and reasonable notice of the writ of *scire facias*, although the only evidence returned to that court of such notice was an affidavit of service thereof on him in this commonwealth. *Comstock* v. *Holbrook*, 111.

See APPEAL; REVIEW; VERDICT, 3; WAY, 4.

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JURISDICTION.

An action commenced before a justice of the peace, containing counts for several causes of action, of some of which he has jurisdiction, and of others not, cannot, after his judgment for the plaintiff on the first, and for the defendant on the others, and the defendant's appeal, be dismissed by the superior court for want of jurisdiction. *Harris* v. *Doggett*, 118.

See EQUITY, 4, 4; EXECUTOR AND ADMINISTRATOR, 4.

JURY.

See ACTION, 5; CARRIER, 1, 3; EQUITY PLEADING, 4; INDICTMENT, 7; SPIRITUOUS AND INTOXICATING LIQUORS, 8; VERDICT, 3.

JUSTICE OF THE PEACE.

See JURISDICTION.

LANDLORD AND TENANT.

See PLEADING, 5.

LARCENY.

A complaint for larceny sufficiently describes the kind and value of property stolen as "copper coin of the value of two dollars and seventy-five cents." *Commonwealth* v. *Gallagher*, 240.

LEGACY.

See WILL.

LIEN.

See CONTRACT, 9.

LIFE INSURANCE.

See INSURANCE, II.

LIMITATIONS.

See EXECUTOR AND ADMINISTRATOR, 1.

LORD'S DAY.

See CHARTER PARTY.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, the best evidence of the institution of the prosecution is a certified copy of the record. *Olmstead* v. *Partridge*, 381.
2. In an action for a malicious prosecution, evidence that the defendant, in commencing the prosecution complained of, acted upon the advice of a person not a counsellor or attorney at law, is incompetent to disprove malice. *Ib.*
3. The wilful overstatement of the amount of stolen property in a complaint

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for larceny is competent evidence of malice in a subsequent action by the defendant against the complainant for malicious prosecution. *Ib.*

MANDAMUS.

While a petition to the court of common pleas under *St.* 1859, *c.* 249, § 3, by the keeper of a jail, dissatisfied with the amount of the salary allowed him by the county commissioners, is pending, payment of the sum so allowed will not be enforced by mandamus. *Adams* v. *County Commissioners*, 41.

MANUFACTURING CORPORATION.

1. One manufacturing corporation may take shares of another in payment of a debt; and neither the first corporation, nor any person taking from it, with knowledge of all the facts, a negotiable promissory note of the second corporation, can, in an action thereon against the latter, summon in other stockholders and have execution against them, under *St.* 1851, *c.* 315. *Howe* v. *Boston Carpet Co.* 493.
2. Under the Rev. Sts. *c.* 38, §§ 17, 22, the notice required to be published annually by the directors of a manufacturing corporation, in order to exempt the stockholders from liability for its debts, may be published at any time within a year from the filing of the certificate of capital stock. *Ib.*
3. The *St.* of 1851, *c.* 315, § 3, does not authorize the levy of an execution, issued on a judgment recovered against a manufacturing corporation, on the property of an officer of the corporation, unless, if he is also a stockholder, he has been summoned and his liability established, or, if he is not a stockholder, some stockholder has been summoned and the liability of stockholders established, in the action in which such judgment was recovered. *Dewey* v. *Baker*, 130.
4. In a suit in equity on the Rev. Sts. *c.* 38, § 32, by a stockholder of a manufacturing corporation who has paid a debt of the corporation, for which the stockholders are liable, to compel contribution by the other stockholders, the amount of the liability of each stockholder is to be determined by an apportionment of the debt among the shares held by solvent stockholders within the jurisdiction of the court. *Cary* v. *Holmes*, 127.

See TAX, 4.

MARINE INSURANCE.

See INSURANCE, III.

MARRIAGE SETTLEMENT.

See TRUST, 1.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MEMORANDUM.

APPOINTMENT OF MR. JUSTICE CHAPMAN, 86.

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MERGER.

See WAY, 14.

MILL.

1. A complaint cannot be maintained under the mill act to recover damages occasioned to an unimproved or unappropriated mill site. *Fuller* v. *Chicopee Manufacturing Co.* 43.
2. On a complaint under the mill act, damages may be recovered for flooding a well and the cellar of a house on the complainant's land. *Fuller* v. *Chicopee Manufacturing Co,* 46.
3. On a complaint under the mill act, damages cannot be recovered for injuries to land which is not itself overflowed, but is rendered less valuable for building purposes by noxious and offensive smells proceeding from the adjacent lands when the water caused by the dam to overflow them is occasionally drawn off. *Ib.*
4. Upon the death of the complainant, pending proceedings under the mill act, the administrator of his estate may be admitted to prosecute the complaint, and to recover such damages as he might have recovered. *Darling* v. *Blackstone Manufacturing Co.* 187
5. On a complaint under the mill act, a release of damages from a former owner for raising the dam to a less height, or a misdescription of the land in the complaint, must be pleaded and tried in court before the issuing of a warrant, and cannot be given in evidence in mitigation of damages at the trial before a sheriff's jury. *Ib.*
6. An award of referees that the owner of a mill-dam shall pay to the owner of land flowed by his dam one hundred dollars a year as long as the dam is kept at its present height, "and no more, unless by so doing he pays damage, if any is done by increasing the height," is no bar to a complaint under the mill act to recover damages occasioned by raising the height of the dam, prosecuted in the name of a person to whom such owner of the land flowed has since the award and the raising of the dam conveyed it, reserving to himself the right to collect the annual damages awarded, and "the right to take all necessary and proper legal measures to collect, either in his own name or in the name of the owner of the estate hereby conveyed, all such damage as shall be caused to said estate by means of said dam, kept at any height up to the present height of said dam; the owner of the estate having the right to recover to his own use all the damage which shall be occasioned to said estate by so much of the height of said dam as shall be above its present height." *McClellan* v. *Fisher*, 185.

See CERTIORARI, 3; EMINENT DOMAIN, 3.

MISNOMER.

See COMPLAINT, 1; INDICTMENT, 3, 4.

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MISTAKE.

See CONTRACT, 6; MONEY LENT; MORTGAGE, 4; PROMISSORY NOTE, 15; VERDICT, 3.

MONEY HAD AND RECEIVED.

See INSURANCE, 10.

MONEY LENT.

The holder of a promissory note, who gives it up to the maker under a mistaken impression that it has been paid in full, may recover the balance unpaid in an action for money lent. *Baxter* v. *Paine*, 273.

MORTGAGE.

I. *Of Real Estate.*

1. A certificate, under the Rev. Sts. *c.* 107, §§ 1, 2, upon a mortgage of real estate, which declares that the mortgagee entered into and upon the mortgaged premises, and declared in the presence and hearing of the two subscribing witnesses, at the time of entering on the estate, that he made the entry thereon and took possession thereof as mortgagee within named for a breach of the condition of the mortgage and for the purpose of foreclosing the same, followed by three years' possession under such entry, is not invalidated by the omission to state that "the entry was open and peaceable," in the absence of evidence to the contrary. *Hawkes* v. *Brigham*, 561.
2. A writ of entry to foreclose a mortgage cannot be maintained against the mortgagor alone, after his estate has been conveyed to a third person and by him conveyed, since the *Sts.* of 1848, *c.* 208, and 1855, *c.* 304, to the mortgagor's wife to her sole and separate use; although the mortgagor has continued to occupy the premises with his wife and family, providing for their support and maintenance. *Campbell* v. *Bemis*, 485.
3. Under the Rev. Sts. *c.* 107, § 29, a second mortgagee may maintain a writ of entry for foreclosure against the first mortgagee, who has taken possession of the premises for the like purpose, and has also obtained a conveyance of the equity of redemption from the mortgagor. *Doten* v. *Hair*, 149.
4. Upon the hearing before an auditor appointed to state the amount due, on a writ of entry to foreclose a mortgage made at the same time with a deed from the mortgagee to the mortgagor, which contained a covenant against all incumbrances except a previous mortgage, and a general covenant of warranty, the plaintiff cannot charge the defendant with a sum since paid in discharge of that mortgage, by proof of an oral agreement between them at the time of making their conveyances that the defendant should assume the payment thereof, and of a mistake of the scrivener in drawing the deeds. *Ruggles* v. *Barton*, 151.

See ACTION, 2, 4; BOND, 6; COSTS, 4; INSURANCE, 5.

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II. *Of Personal Property.*

5. The mortgagee of personal property, although his mortgage is not recorded, may maintain an action of tort against one who, without any title, takes the property from the possession of the mortgagor. *Pratt* v. *Harlow*, 379.
6. At the trial of an action by a mortgagee of personal property (whose mortgage provided that the mortgagor might retain possession until default, but that upon any attachment by any other creditor of the mortgagor the mortgagee might take immediate possession) against an officer attaching it as the property of the mortgagor, such attachment was admitted, but there was no evidence that the mortgagee had taken possession. The judge declined to rule that the plaintiff had shown no sufficient right to the mortgaged property to maintain the action, and submitted the case to the jury under other instructions not excepted to. *Held*, that the defendant had no ground of exception. *Kent* v. *Reed*, 282.

See PROMISSORY NOTE, 2; SPIRITUOUS AND INTOXICATING LIQUORS, 9.

III. *Of Railroad.*

See RAILROAD, 1 – 5.

MURDER.

1. In this commonwealth, the technical definition of murder remains the same under *St.* 1858, *c.* 154, as the common law definition as previously recognized by the courts. *Commonwealth* v. *Desmarteau*, 1.
2. Under *St.* 1858, *c.* 154, murder committed with extreme atrocity or cruelty is murder in the first degree, although the atrocity or cruelty is not alleged or proved to have been premeditated. *Ib.*
3. Evidence that a man enticed a girl under eight years of age out of a house, and immediately ravished her, thereby inflicting severe wounds upon her person, and as a part of the same transaction, and for the purpose of concealing that crime and escaping punishment therefor, inflicted numerous severe blows upon her head and face and threw her into a river, and by these means caused her death, is sufficient evidence of murder committed with extreme atrocity and cruelty to warrant a jury in finding him guilty of murder in the first degree under *St.* 1858, *c.* 154, even if the only means of death alleged in the indictment are blows upon the head and face, and drowning. *Ib.*
4. An indictment alleging murder in the same form as at common law will support a verdict of guilty of murder in the first degree under *St.* 1858, 154. *Ib.*

See INDICTMENT, 2 – 5; VERDICT, 1.

MUTUAL INSURANCE COMPANY.

See FOREIGN INSURANCE COMPANY.

NAME.

See COMPLAINT, 1; INDICTMENT, 3, 4.

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NEGLIGENCE.

See ACTION. 5; RAILROAD, 8; TOWN, 4; WAY, 8, 11.

NEW TRIAL.

See CARRIER, 3

NOTICE.

See AMENDMENT; BOND, 2; COUNTY COMMISSIONERS, 3; EXECUTOR AND ADMINISTRATOR, 1; FREIGHT; JUDGMENT; MANUFACTURING CORPORATION, 2; WAY, 8.

NUISANCE.

I. *In General.*

1. The statutes of the Commonwealth have not superseded the remedy by indictment at common law for a nuisance in carrying on an unlawful and offensive trade and manufacture. *Commonwealth* v. *Rumford Chemical Works*, 231.
2. An indictment for a nuisance at common law sufficiently describes the nuisance, and is not bad for duplicity, which alleges that the defendants at a certain day and place set up and maintained certain buildings, and on that day and on divers others between that day and the day of the finding of the indictment used and employed therein large quantities of acid, guano, tar, oil, bone and dead bodies and other noxious and offensive substances in the manufacture of acids, colors, chemicals and chemical products, by means whereof divers noxious and offensive smokes, gases, smells and stenches were emitted, so that the air was filled and impregnated therewith, and rendered corrupt and unwholesome, to the great damage and common nuisance of all persons then and there being. *Ib.*
3. The testimony of the superintendent and a director of an incorporated turnpike company and of one other person, to the effect that a horse railroad track, about to be constructed under an agreement with the turnpike company, on the side of the turnpike road, leaving unobstructed the travelled road of such width as the turnpike company is required by its charter to maintain, will be an obstruction to the public travel and a public nuisance, is not sufficient to overcome the presumption that the turnpike company, being charged by law with maintaining their road in a fit condition for public travel, will not permit acts which will interfere with and obstruct it; nor to warrant a court of equity in restraining by injunction the laying of the track. *District Attorney* v. *Lynn & Boston Railroad*, 242.
4. The construction of a track for a horse railroad over a turnpike road, under an agreement with the turnpike company, by a corporation, whose charter contains a restriction making it "void so far as relates to the right to construct the said road in any town until the act has been accepted by the selectmen," will not be restrained by injunction as a nuisance in a town traversed by the turnpike road, merely because the selectmen of the town have not accepted the charter *Ib.*

See INFORMATION.

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II. *Under the Statute of* 1855, *c.* 405.

5. An indictment on *St.* 1855, *c.* 405, which alleges that the defendant at a certain time and place kept and maintained "a certain building, place and tenement, to wit, a room in a dwelling-house," used for the purposes prohibited by that statute, "whereby, and by force of the statute in such case made and provided, the said building, place and tenement, then and there kept and maintained by the defendant and then and there used as aforesaid, was then and there a common nuisance," sufficiently alleges the place where the building was situated, and that the room was a common nuisance. *Commonwealth* v. *Donovan*, 18.

6. Upon the trial of an indictment for maintaining a building used for the illegal keeping and illegal sale of intoxicating liquors, the Commonwealth, after introducing evidence that a room occupied by the defendant was fitted with the common appliances for the sale of liquors, and that persons drank ale there, may prove that persons have been seen on the defendant's premises and leaving them in a state of intoxication. *Commonwealth* v. *Higgins*, 19.

7. Proof that the defendant maintained a building used for the illegal keeping and illegal sale of intoxicating liquors, for any substantial period of time, even one day, will support an indictment for maintaining it during a year. *Ib.*

See SPIRITUOUS AND INTOXICATING LIQUORS, 2.

OFFICER.

See ASSAULT AND BATTERY, 2; RECEIPT; TOWN, 2, 3.

ORDER.

See ASSIGNMENT.

PARENT AND CHILD.

A husband who receives into his family the children of his wife by a former marriage stands to them *in loco parentis*, and, in the absence of express contract or of circumstances showing a different arrangement, has a right to their services, and is liable for their support and education. *Mulhern* v. *McDavitt* 404.

See GUARDIAN AND WARD.

PARISH AND RELIGIOUS SOCIETY.

The provisions of the Rev. Sts. *c.* 20, § 25, are not affected by the *Sts.* of 1855, *c.* 314, and 1858, *c.* 133. *Silsby* v. *Barlow*, 329.

See CONDITION, 1, 2; EQUITY, 6; WILL, 9.

PARTIES TO ACTIONS.

See PLEADING, I.

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PARTNERSHIP.

A person cannot be charged as a copartner in business carried on at a mill, for the price of a steam-engine and machinery erected in the mill under a written contract with another person admitted to be a copartner, by proof of his being owner as tenant in common of the mill with those admitted to be copartners; and of his having said that the engine was satisfactory, and that when the mill was built he was a partner in the concern, but had since sold out to the others. *Thurston* v. *Horton*, 274.

See EQUITY, 5; GUARANTY; INSOLVENT ESTATES, 2; PROMISSORY NOTE, 10, 11.

PATENT.

See CONTRACT, 3.

PAUPER.

1. A citizen living three years successively, under an arrangement between all concerned, upon land of which he has paid the price, and which has been conveyed to a third person, who has given a bond to convey the same to him upon his paying a certain sum for the house thereon, and to permit him meanwhile to receive the rents and profits thereof to his own use, has an estate of inheritance therein in trust, and gains a settlement under the Rev. Sts. *c.* 45, § 1, *cl.* 4. *Inhabitants of Randolph* v. *Inhabitants of Norton*, 395.
2. In an action brought against a town, a part of which has been made a new town by a statute providing "that the said towns shall hereafter be respectively liable for the support of all persons relieved as paupers, whose settlement was gained by or derived from a residence within their respective limits," to recover for the support of a pauper who had a settlement in the old town, the burden of proof is on the plaintiff to show that such settlement was acquired by a residence within the territory which remains since the division a part of the town now sued. *City of New Bedford* v. *Inhabitants of Middleborough*, 295.

See EVIDENCE, 11.

PAYMENT.

See GUARANTY; PROMISSORY NOTE, 3, 9; RELEASE.

PETITION.

See CERTIORARI, 2, 3; RAILROAD, 7.

PHOTOGRAPH.

See EVIDENCE, 6, 7.

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PLEADING.

See APPEAL; CERTIORARI; COMPLAINT; COUNTY COMMISSIONERS, 2; EQUITY PLEADING; INDICTMENT; MILL, 4–6; RAILROAD, 7.

I. *Parties to Actions.*

1 Under the *St.* of 1852, *c.* 312, § 8, sureties on a bond, severally but not jointly liable, may be joined as defendants in one action on the bond. *Grocers' Bank* v. *Kingman*, 473.

See EQUITY, 2, 6; EQUITY PLEADING, 2; FRAUD; MORTGAGE, 2; PROMISSORY NOTE, 4, 12.

II. *Declaration.*

2. In an action of tort against a town for a penalty imposed by statute for neglecting to choose three fishwardens at the annual meeting, a declaration which sets out the whole statute, and alleges that at the annual meeting in a certain year the town neglected to choose three fishwardens, as by the statute it was required to do, need not further allege that it was the duty of the town to make choice of any particular number of fishwardens, or that the statute is still in full force and unrepealed, nor conclude against the form of the statute. *Williams* v. *Inhabitants of Taunton*, 288.
3. Under the *St.* of 1852, *c.* 312, § 2, *cl.* 9, a declaration on a written contract, stating its legal effect, is sufficient, without alleging it to be in writing or setting forth a copy. *Higgins* v. *McDonnell*, 386.
4. An allegation of time in a declaration for money lent is surplusage. *Baxter* v. *Paine*, 273.
5. In an action on a recognizance under the Rev. Sts. *c.* 104, § 10, to prosecute an appeal from a judgment of a justice's court for possession of a tenement, and to pay the rent already due and all intervening rent, damages and costs, the plaintiff, under a declaration alleging that the defendants have not paid said rent due and in arrear, and all intervening rent, damages and costs, may, if the defendant does not demur or move for a more particular statement, recover the full value of the rent, though increased since the commencement of the suit for possession. *Jackson* v. *Richards*, 497.

See ASSAULT AND BATTERY, 1; DOG, 2.

III. *Answer, Demurrer, &c.*

6. Under the *St.* of 1852, *c.* 312, the defendant in replevin, under an answer denying the plaintiff's title and right of possession, may prove property in himself. *Verry* v. *Small*, 121.
7. Under a declaration on an account annexed containing items for cash, and an answer denying that the defendant received the sums charged or owes them or any part of them to the plaintiff, the defendant may prove that he received the sums charged and applied them, with the consent of the plaintiff, to the extinguishment of debts previously due to him from the plaintiff. *Howard* v. *Hayward*, 354.

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8. A defendant, who, after entering in this court exceptions duly filed and allowed in the superior court of Suffolk, obtains a certificate of discharge in insolvency, may be allowed to waive his exceptions and plead it; and such certificate will be a bar to the action, and will discharge a bond given to dissolve an attachment therein. *Swan* v. *Easterbrooks*, 520.

9. In a demurrer which goes to the whole ground of action, the cause is sufficiently stated by alleging "that the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action." *Chenery* v. *Inhabitants of Holden*, 125.

See MILL, 5; PROMISSORY NOTE, 14.

PLYMOUTH WATER WORKS.

See CERTIORARI, 8.

POOR DEBTORS.

1. The inhabitants of a county cannot maintain an action of contract against a creditor, who has had his debtor arrested on mesne process and kept in close confinement in the county jail, for board furnished to the debtor by the jailer upon his claiming support as a pauper, if the creditor, after a demand upon him by the jailer to pay for such board, has not requested the county or the jailer to detain the debtor in prison, or to furnish him with board, nor promised to pay for the debtor's support. *County of Worcester* v. *Schlesinger*, 166.

2. Under *St.* 1857, *c.* 141, a return of *non est inventus* upon an execution will not support a writ of *scire facias* against the sureties in a bail bond, given by the defendant upon his arrest on mesne process in the same action, who has since taken the poor debtor's oath, unless the certificate required by § 3 was annexed to the execution. *Rhodes* v. *Brooks*, 170.

3. A recognizance, taken by the justice of a police court from a debtor arrested on execution and carried before him pursuant to *St.* 1857, *c.* 141, the condition of which requires the debtor to surrender himself for examination in court, instead of before the justice, is void. *Underwood* v. *Clements*, 169.

See AMENDMENT

POWER.

See WILL, 3.

PRESCRIPTION.

See WAY, 14.

PRINCIPAL AND AGENT.

A committee authorized by vote of the proprietors of a meeting-house to sell it on a day named have no authority to make the sale on any other day. *Bliss* v. *Clark*, 60.

See BANK, 2; COMMISSIONS; CONTRACT, 4, 5; EVIDENCE, 2, 17; FRAUD; INSURANCE, 3, 4; PROMISSORY NOTE, 4, 5.

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PRINCIPAL AND SURETY.

The liability of a principal to indemnify his surety for any payment which the latter may be compelled to make for the former takes effect from the time when the surety agrees to become responsible for the debt of his principal, and not from the time when a payment is made; and is a "debt contracted" at the former time, within the exception in the homestead act of 1855, *c.* 238, § 3. *Rice* v. *Southgate*, 142.

See BOND, 2–4; PLEADING, 1; PROMISSORY NOTE, 6.

PRIVATE WAY.

See WAY, 12, 13.

PRIVILEGED COMMUNICATION.

See SLANDER.

PROBATE BOND.

See APPEAL, 3; EXECUTOR AND ADMINISTRATOR, 3–5.

PROBATE COURT.

See APPEAL, 3.

PROMISSORY NOTE.

1. At the trial of an action on a promissory note, there was evidence that the plaintiff had signed and delivered certain deeds of land, which the presiding judge erroneously ruled to be void, in consideration for other lands purchased by him of a third party with covenants of warranty against all incumbrances; that these lands were at the time subject to a mortgage, which the grantor undertook to get discharged, but which had not been discharged at the time of the trial; and that the plaintiff subsequently agreed orally to take the note in suit, instead of the discharge of this mortgage. The presiding judge refused to instruct the jury that there was no evidence in the case, other than the note itself, tending to show a consideration for it; and instructed them that if the note was given and accepted in satisfaction or partial satisfaction of the claim for damages on the covenant against incumbrances in the deed to the plaintiff, he might recover. *Held*, that the defendant had no ground of exception. *Small* v. *Jenkins*, 155.
2. A promissory note, given in consideration of the payee's verbal promise to convey to the maker an interest in land, and to release certain claims against the maker and a third person, is not wholly void; and the payee may enforce a mortgage of personal property given to secure payment of the note, if it does not appear that the property exceeds in value the latter part of the consideration. *Jenkins* v. *Williams*, 158.
3. A promissory note, secured by mortgage, taken since the passage of the homestead exemption acts, in exchange for a note made before those acts and

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not so secured, is to be presumed to be taken in payment of the first note, and is affected by those acts. *Adams* v. *Jenkins*, 146.

4. A promissory note, in which no principal is mentioned, and signed "A. B., Ag't," binds A. B. only, and will not support an action against any other person. *Williams* v. *Robbins*, 77.

5. A partnership of dealers in furniture in one place owned a manufactory in another, at which the business was conducted by A. B. under the name of "A. B. Ag't." The agent gave a note, so signed, for goods delivered to the workmen there upon his order. *Held*, that an action could not be sustained thereon against the partnership by evidence that in a previous instance for a similar claim such a note had been given to the same person, and, not being paid at maturity, had been presented to the partnership, who at first declined to pay or give their own note for it; but, on being asked if they repudiated the agent's transactions, said that they did not, but wished to keep the business at the manufactory separate from their other business, and that the holder might go to the place where the manufactory was and secure himself there; but finally gave their note instead of the other, and subsequently paid it; and that on other occasions the partners said that they would settle or be responsible for all claims for anything that went into their business at that place. *Ib.*

6. One who writes his name upon the back of a promissory note before its delivery to or indorsement by the payee is not liable as an original promisor, if, at the time of so signing his name, the intention both of himself and of the payee is that he should assume the liability of a second indorser only; and whether such was their joint intention is a question of fact for the jury. But he is so liable if the plaintiff received it in the belief that it was the valid note of the defendant, induced by the ordinary and reasonable import of the defendant's words and acts. *Patch* v. *Washburn*, 82.

7. The contract of one who places his name, waiving demand and notice, on the back of a promissory note, while in the hands of an indorsee for value, at the request of such indorsee, for a consideration moving solely from him, and without any request, express or implied of the first indorser, is not that of a second indorser, but of a guarantor; and if, after the commencement of proceedings in insolvency against the first indorser, he pays the note, he cannot set off the amount in an action by the assignee in insolvency upon a debt due from him to the insolvent. *Nelson* v. *Harrington*, 139.

8. The maker of a promissory note given for the purchase of a chattel, which the vendor has no authority to sell, may set up this want of authority in defence of an action on the note by the vendor, without returning the bill of sale, and even if he afterwards sells for a valuable consideration whatever title he obtained by the transaction. *Bliss* v. *Clark*, 60.

9. In an action on a promissory note, the defendant filed a declaration in set-off on an account annexed, one of the items in which was for cash. The plaintiff's answer admitted the receipt of the cash, and alleged that it was in part payment of the note and had been indorsed upon it. At the trial it appeared that the defendant had given the note in payment for a lot of wood

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bought by him of the plaintiff, and the defendant put in evidence a bill of parcels of it, signed by the plaintiff, in which the amount of the price charged was equal to the face of the note, and payment of the whole was acknowledged. *Held*, that the plaintiff might prove that, in a certain contingency, the defendant was to pay him an additional sum for the wood, equal to the cash item charged in the account annexed to his declaration in set-off; that the contingency had occurred; and that he had applied the money paid to him by the defendant to the discharge of this additional debt with the defendant's consent; and upon such proof might recover the whole amount of the note. *Howard* v. *Hayward*, 354.

10. Evidence that a promissory note, which in terms is payable absolutely, was given for money paid under an agreement made between the maker and the payee, at the time of forming a copartnership together, by the terms of which the payee was to pay to the maker a certain sum of money, upon the receipt of the whole of which the maker was to convey to the payee an undivided half of the partnership property and receive back the note; that the parties afterwards, as copartners, carried on business and used in it the money for which the note was given; and that the maker had always been ready to convey half of the partnership property to the payee, upon receipt of the balance of the sum agreed upon, but the latter had refused to pay the remainder of that sum; is not admissible in defence of an action on the note by the payee. *Perkins* v. *Young*, 389.

11. It is no defence to an action brought by the indorsee against the maker of a promissory note, payable on demand, that the maker and payee are or have been copartners in business, and that the accounts between them are unsettled. *Ib.*

12. The indorsee of a promissory note may maintain an action thereon in his own name, although the property in the note continues in the indorser. *Peaslee* v. *McLoon*, 488.

13. If a promissory note, which, before delivery, is deposited by the maker to be delivered to the payee only upon the happening of a certain contingency, is delivered to the payee without the knowledge or consent of the maker and without the happening of the contingency, and is by him transferred for value before maturity to a person, who takes it without notice of the special circumstances under which it came into the possession of the payee, such innocent holder for value may enforce payment of the note against the maker. *Fearing* v. *Clark*, 74.

14. A promissory note, which states that it is "to be held as collateral security for the payment of" certain debts of third persons, is not negotiable, and an indorsee cannot maintain an action thereon, even if the objection that it is not negotiable is not made in the answer. *Haskell* v. *Lambert*, 592.

15. An oral promise by the indorser of a promissory note to pay the same, made, without being misled, after maturity of the note, and with a knowledge that there has been no demand for payment upon the maker, or notice of nonpayment given to himself as indorser, and of all other material facts, is a waiver of the want of demand and notice, and renders him liable on the

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note, without a new consideration, although the note is payable on demand, and he does not know that upon such a note the law required demand and notice. *Matthews* v. *Allen*, 594.

16. The indorser of a promissory note made by a corporation, of which he was treasurer for more than a year before it was made, and who is sought to be charged without proof of demand and notice, upon the ground that he had promised to pay it after it was due, has no ground of exception to an expression of opinion by the presiding judge to the jury, that the defendant, being treasurer of the corporation, must be presumed to have had knowledge that no demand had been made or notice given. *Ib.*

See CONTRACT, 6; EVIDENCE, 5; FOREIGN INSURANCE COMPANY; MONEY LENT.

RAILROAD.

1. After a railroad corporation had executed a mortgage of its road, it united with two other railroad corporations in organizing a new corporation under the authority of an act of the legislature, which vested the property of the three former corporations, subject to all liens and incumbrances then existing upon it, in the new corporation, and provided that the first corporation should not by such union be relieved from any liability or obligation under which it then was, and that "when the several corporations shall in conformity to the requirement of the statutes have become one, all the franchises, property, powers and privileges now enjoyed by, and all the restrictions, liabilities and obligations conferred upon, said two corporations by virtue of their respective charters shall appertain to said united corporation, in the same manner as if contained or acquired under an original charter." *Held*, that this statute did not require the new corporation to assume the liabilities of the former corporations; and that the new corporation, having become the owner of the franchise and property of the first corporation, might become purchasers of its outstanding bonds, and hold them like any other creditor, or pay and extinguish them for the relief of the mortgaged property. *Shaw* v. *Norfolk County Railroad*, 407.

2. *Held, also*, that the directors of the new corporation had authority, without a vote of the stockholders, to pay and cancel so many as they thought fit of the outstanding obligations of the first corporation. *Ib.*

3. *Held, also*, that the new corporation could not prove the amount of the interest coupons attached to the bonds in their hands against the mortgaged property, so as to relieve it to that extent from liability under the mortgage. *Ib.*

4. *Held, also*, that bonds of the first corporation, bought by the new corporation, and afterwards reissued for the benefit of this corporation to holders for a valuable consideration, had not been extinguished, but should be allowed as a claim against the property covered by the mortgage. *Ib.*

5. *Held, also*, that the bondholders were not entitled to interest upon the interest coupons attached to the bonds. *Ib.*

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6. Under the *St.* of 1840, *c.* 85, a railroad corporation is liable for injuries by fire communicated from one of its locomotive engines to machinery, tools, patterns and lumber in a building near its road, or to a fence by the side of its track. *Trask* v. *Hartford & New Haven Railroad*, 71.

7. A petition to the mayor and aldermen of Boston for the assessment of damages was filed by two owners of land over which a railroad had been located, and an order of notice issued thereon. Some years afterwards, a new petition was filed by the administrator of one of the petitioners and the other petitioner, stating that the proceedings upon the first petition had been restrained by a suit in equity, since dismissed, and praying that such proceedings be had in the premises as were prayed for in the first petition. *Held*, that an adjudication by the mayor and aldermen upon the last petition was, in effect, an adjudication upon the first, and authorized the petitioner to apply to the superior court for a jury. *Whitman* v. *Boston & Maine Railroad*, 530.

8. A passenger in a railroad car, who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury resulting therefrom. *Gavett* v. *Manchester & Lawrence Railroad*, 501.

See CARRIER; CONTRACT, 7; NUISANCE, 3, 4; TRUSTEE PROCESS, 1; WAREHOUSEMAN.

RECEIPT.

One who signs a receipt for goods attached, agreeing to redeliver them to the attaching officer or his order on demand, free from all charge and expense to the officer or the creditor, cannot discharge himself by an offer to redeliver them before demand, unless expressly authorized so to do by the terms of his receipt. *Rowland* v. *Cooper*, 53.

RECOGNIZANCE.

See COSTS, 3; PLEADING, 5; POOR DEBTORS, 3.

RECORD.

See COMPLAINT, 4.

RELEASE.

A release, not under seal, of one partner, by a creditor of the partnership, in consideration of a payment of part of the debt, though out of the funds of the partnership, is no discharge of the residue. *Bemis* v. *Hoseley*, 63.

REMAINDER.

See TRUST, 1; WILL, 5.

RENT.

See PLEADING, 5.

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REPLEVIN.

An article of personal ornament cannot be taken on a writ of replevin from the person of the defendant, without his consent, even if worn by him for the sole purpose of keeping it beyond the reach of legal process. *Maxham* v. *Day*, 213.

See DAMAGES, 1; PLEADING, 6; SALE, 4.

RESCISSION.

See CONTRACT, 12.

RETURN.

See AMENDMENT; EXECUTION.

REVERSION.

See ACTION, 3; TRUST, 1.

REVIEW.

The mere fact that an action in which judgment has been rendered for the defendant for costs was brought in the plaintiff's name, without his consent, is no ground for granting a review. *Fullam* v. *McKenny*, 579.

SALE.

1. The owner of a horse kept at a livery stable agreed at another place to sell it, received the price from the purchaser, and at the same time the seller paid the stabler for the previous keep of the horse, and the purchaser directed him to continue to keep it and feed it on hay, and promised to pay him therefor, and the stabler afterwards removed the horse from the stall in which it had been to another more convenient for feeding it with hay. *Held*, that, in the absence of fraud, these facts showed a delivery of the horse as against a subsequent attaching creditor of the seller. *Bullard* v. *Wait*, 55.
2. A. delivered a chattel to B. under an agreement that it should belong to B., that B. need not pay for it until he sold it, and should then pay a certain price for it; and B. redelivered the chattel to A. for sale. *Held*, that, in the absence of fraud, the title had passed to B. even as against attaching creditors of A. *Green* v. *Rowland*, 58.
3. A person who makes a contract in writing for the building of a ship, to be finished and ready for sea on a day and at a place named in the contract, for a fixed price, part of which he agrees to pay while the work is in progress, in regular weekly payments, without regard to the amount of work accomplished, and the remainder when the ship is ready for sea, acquires no property in the ship before her completion, although an agent employed and paid by him to superintend the construction is, by oral permission of the builders,

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present every day while the ship is building, making suggestions and giving directions about the work. *Williams* v. *Jackman*, 514.

4. A plaintiff in replevin, claiming title by sale from a former owner, has no ground of exception to an instruction to the jury that, if the acts and declarations relied on by him to show a sale were merely colorable and not intended to pass any title or possession to him, they might disregard them as evidence of ownership in him. *Dawson* v. *Wetherbee*, 123.
5. A bill of sale cannot be impeached or avoided by the seller's creditors, or by an officer attaching it in their behalf, on the ground of duress. *Lewis* v. *Bannister*, 500.

See CONTRACT, 4, 5, 10, 12; EVIDENCE, 2; FRAUD; FRAUDS, STATUTE OF, 2; PROMISSORY NOTE, 8.

SCHOOL DISTRICT.

1. By the *St.* of 1849, *c.* 206, two school districts since established, containing the same territory which, differently divided, previously constituted two of the school districts in the town, and in which new districts a school district tax has been assessed and collected, cannot within ten years be consolidated into one district. *Holmes* v. *Baker*, 259.
2. The *Sts.* of 1849, *c.* 206, and 1851, *c.* 303, forbidding the redistricting of towns into school districts oftener than once in ten years, do not prevent towns from abolishing all school districts. *Mendell* v. *Inhabitants of Marion*, 353.

See EQUITY, 7; TOWN, 1.

SCIRE FACIAS.

See JUDGMENT, 2; POOR DEBTORS, 2.

SEISIN.

See DEED, 1, 3.

SERVICE.

See COUNTY COMMISSIONERS, 3; JUDGMENT, 2.

SET OFF.

See PROMISSORY NOTE, 7, 9.

SETTLEMENT.

See PAUPER; TRUST.

SEVERANCE.

See CONTRACT, 10; JUDGMENT, 1.

SHARES.

See CORPORATION, 2.

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SHIPS AND SHIPPING.

See CHARTER PARTY; EVIDENCE, 8; FRAUD; SALE, 3.

SLANDER.

At a town meeting having under consideration an application from the assessors of the town for reimbursement for expenses incurred in defending a suit, on the ground that it was brought against them for acts done in their official capacity, which is opposed because that suit was brought against them for making false answers under oath to interrogatories propounded to them in another suit, a statement of a voter and taxpayer in the town that they had therein perjured themselves is privileged, if made in good faith, with a belief of the speaker in its truth, and without actual malice towards the assessors. *Smith* v. *Higgins*, 251.

See EVIDENCE, 12.

SPECIFIC PERFORMANCE.

See CONTRACT, 2; EQUITY, 3–5.

SPIRITUOUS AND INTOXICATING LIQUORS.

1. The allegation of time in an indictment for a single sale of intoxicating liquors need not be proved as laid, although the indictment contains a count for being a common seller. *Commonwealth* v. *Maloney*, 20.
2. Evidence of unlawful sales of intoxicating liquors under such circumstances as would support an indictment for a nuisance under *St.* 1855, *c.* 405, is admissible in support of an indictment for the single sales under *St.* 1855, *c.* 215. *Ib.*
3. Under an indictment for being a common seller of intoxicating liquors, evidence may be introduced that persons were frequently seen to go in and out of the defendant's shop at all hours of the day and evening; that some of them carried in and out jugs and demijohns and gin and beer barrels; and that the defendant's name was on the shop. *Ib.*
4. Upon the trial of an indictment for being a common seller of intoxicating liquors, testimony that the defendant kept a bar, and was the proprietor of a public house, is competent in connection with evidence tending to show that intoxicating liquors were sold on the premises. *Commonwealth* v. *Norton*, 30.
5. Evidence that a room in the defendant's dwelling-house was fitted up with a bar and shelves on which were decanters, glasses and other articles used in the mixing and retail of ardent spirits, and that there were casks containing liquors of various kinds in an adjoining cellar, is competent evidence to support an indictment for being a common seller of intoxicating liquors. *Commonwealth* v. *Whalen*, 23.
6. On the trial of an indictment for being a common seller of intoxicating liquors, no exception lies to an instruction that of the jury are satisfied upon the whole evidence that the defendant has unlawfully made three single sales of intoxicating liquors, they are authorized to find him guilty; or to a refusal

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to instruct them that it is incumbent on the Commonwealth to prove each of such sales as independent transactions by the same evidence, and as fully and satisfactorily, as if each had been charged as a separate sale. *Ib.*

7. A wife who, in pursuance of a contract made by her husband for the illegal sale of intoxicating liquors, delivers the same to the purchaser in his absence, may be punished for it under *St.* 1855, *c.* 215, § 17. *Commonwealth* v. *Whalen*, 25.

8. Upon the return into court of a jury which had been charged with an indictment on *St.* 1855, *c.* 215, for the unlawful sale of intoxicating liquors, the foreman informed the court that there was no prospect of an agreement, and that there was but one juror who refused to agree, and asked the court whether a juror had a right to set aside the provisions of the statute against the sale of ale because the city government had permitted persons to sell it. The court instructed the jury that they could not disregard any of the provisions of the statute, which made illegal not only the sale of ardent spirits but also of ale; that both the rights of the defendant and the interest of the public required that these cases should be terminated; and that, while no juror should render a verdict against his convictions, it was a fact for any dissenting juror's consideration that the rest of the panel differed from him. *Held*, that the defendant had no ground of exception. *Ib.*

9. A mortgage of spirituous and intoxicating liquors passes the title therein to the mortgagee, which will sustain an action against one taking them without authority, and is not invalidated by containing a provision that the proceeds of any sale of the property made by the mortgagor shall be applied to the purchase of articles of the same kind, to be held subject to the mortgage. *Cobb* v. *Farr*, 597.

See Exceptions, 4; Nuisance, II.

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See Abortion, 2; Bridge, 1; Equity, 4; Fishery; Homestead, 5; Indictment, 6; Nuisance, 1.

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STOCKHOLDER.

See MANUFACTURING CORPORATION.

SUPREME JUDICIAL COURT.

See EXECUTOR AND ADMINISTRATOR, 4.

SURETY.

See PRINCIPAL AND SURETY.

TAX.

1. An inhabitant of a town within the Commonwealth, who before the first of May has left the Commonwealth with the intention of never returning, and of taking up his abode in a town in another state, and is on the first of May in another town in that state, is not under the Rev. Sts. *c.* 7, § 9, taxable in the Commonwealth on the first of May, although he has not yet acquired a domicil in the other state. *Briggs* v. *Inhabitants of Rochester*, 337.
2. Personal property, liable under the Rev. Sts. *c.* 7, § 10, and *St.* 1839, *c.* 189, § 1, to taxation in the town where the owners hire or occupy manufactories, stores, shops or wharves, is not exonerated from taxation there, because the person owning it is a citizen and inhabitant of and engaged in business in another state where he is liable to pay taxes assessed upon his personal property. *Leonard* v. *City of New Bedford*, 292.
3. On a petition to the county commissioners for the abatement of a tax on the ground of overvaluation by the assessors, the relative value of property subject to taxation is to be ascertained, not by comparison with any particular

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piece of property assessed to another person, but by comparison with the whole property subject to taxation in the town; and the exclusion of testimony of persons acquainted with the general value of property in the town, that the valuation complained of is not excessive or disproportionate, and is not excessive or disproportionate in comparison with the valuation of other specific parcels of property in the same town, is not necessarily erroneous. *Chicopee* v. *County Commissioners*, 38.

4. A decision by county commissioners, on a petition for the abatement of a tax assessed upon the property of a manufacturing corporation, that the price for which the stock sold in the market was a conclusive test of the value of the company's real estate and machinery for the purposes of taxation, the corporation owning no other property and owing no debts, is an error for which a writ of *certiorari* will issue. *Ib.*

See ACTION, 4; BOND, 5; EQUITY, 7.

TENANT IN COMMON.

See DEED, 2; EVIDENCE, 13; WILL, 6.

TIME.

See CHARTER PARTY; COMPLAINT, 2; CONTRACT, 2; EVIDENCE, 1; FREIGHT; MANUFACTURING CORPORATION, 2; PLEADING, 4.

TOWN.

1. A town which has abolished school districts may purchase the school-houses belonging to the districts, assume all liabilities outstanding against the same, and refund the money paid as school district taxes since such abolition. *Mendell* v. *Inhabitants of Marion*, 353.
2. It is no defence to an action for a penalty imposed by statute upon a town for neglect at its annual meeting to choose certain officers, that the old officers would by law hold over until the election of new ones, or that such officers were in fact chosen at a special meeting, called for the purpose, shortly after the annual one. *Williams* v. *Inhabitants of Taunton*, 288.
3. A city is not liable for a personal injury occasioned by the negligence of the members, appointed and paid by the city council, of a fire department established by the city council, pursuant to an act of the legislature. *Hafford* v. *City of New Bedford*, 297.
4. It is no defence to an action by a town which has been obliged to pay damages for an injury occasioned by an obstruction in a highway, against the person who placed the obstruction there, that the negligence of the town in not removing the obstruction contributed to the injury. *Swansey* v. *Chace*, 303.
5. A town which has voluntarily paid damages for an injury occasioned by an obstruction in the highway, for which the town was liable, may recover the same of a person who placed the obstruction there, if the amount paid was reasonable and the town gave him notice of the claim before payment. *Ib.*

See BRIDGE; DOG, 2; PLEADING, 2; SCHOOL DISTRICT; SLANDER; WAY, 2, 3, 5–11.

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TREASURER.

See CORPORATION, 2; EQUITY, 6; PROMISSORY NOTE, 16.

TRESPASS.

See ACTION, 2 – 4; COSTS, 2; EVIDENCE, 13; WAY, 16.

TRIAL.

See INDICTMENT, 7.

TROVER.

See FIELD DRIVER; MORTGAGE, 5; SPIRITUOUS AND INTOXICATING LIQUORS, 9.

TRUST.

1. A marriage settlement of real and personal property, executed before the Revised Statutes, recited that the settler "is desirous of securing the said estate, both real and personal, in the event of her marriage, to her sole use and benefit; and for this purpose it hath been agreed that all the estate and property aforesaid shall be granted, assigned and transferred unto J. S., to be held in trust by him for the separate and sole use and benefit of" the settler, "and her heirs, (notwithstanding any such coverture,) upon the terms and conditions, for the uses, intents and purposes, under the limitations, and for and during the time, as hereinafter is expressed;" and conveyed the property to the trustee in trust "to the sole use and behoof of" the settler "and her heirs until the solemnization of any such marriage, and from and immediately afterwards" to be held during her life "to the sole use and separate benefit" of the settler, "without being liable to the debts, incumbrances or control of any husband she may have during the existence and continuance of said trust," to pay the income, as well as such portion of the principal as the trustee should judge necessary for her convenience and support to the settler or to such person as she without the signature or interference of any husband should appoint, "for and during the natural life" of the settler, "that is to say, for and during the term for which said trust shall continue," and after her decease to pay the unpaid income and transfer the remaining property to her children, if she should leave any, and, in case she should die without issue, then to transfer the same in like manner unto her heirs at law. Among the covenants of the trustee with the settler was one that upon her death he would transfer the property to her child or children if she should leave any; but there was no covenant with respect to her heirs at law. *Held*, that the settler, from the time of her marriage, took an equitable estate for life; with a contingent remainder to her children if she should leave any; and with a reversion to herself, in case of her death without issue, which she could lawfully dispose of by will. *Loring* v. *Eliot*, 568.
2. Under a will bequeathing a sum of money to infants, "to be kept in the hands of a trustee and paid over to the legatees upon their reaching the age

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of twenty years," and appointing no trustee, the executor is bound to act as such trustee. *Holbrook* v. *Harrington*, 102.

See CONDITION, 1, 2; EQUITY, 5; EQUITY PLEADING, 1; PAUPER, 1; WILL, 7, 8.

TRUSTEE PROCESS.

1. A railroad corporation, which, under an agreement between itself and other railroad corporations whose railroads form a connecting line, settles and pays accounts monthly with that corporation only whose road adjoins its own, including therein the amounts due to the corporations whose roads lie beyond, is not liable as trustee in foreign attachment of that corporation for a sum so found due to it, and for which it is in turn liable to the other corporations under the agreement. *Chapin* v. *Connecticut River Railroad*, 69.
2. On the trial of an issue between the plaintiff and a claimant in a trustee process, it is within the discretion of the presiding judge, under *St.* 1839, *c.* 107, § 1, to admit the deposition previously taken of a witness present in court at the trial and willing to testify; and if a deposition is so used by the plaintiff in putting in his case, after the claimant has rested his, the refusal of the judge to allow the claimant afterwards to examine the witness, except to rebut the plaintiff's evidence, is no ground of exception. *Hodgkins* v. *Pearson*, 384.

See ASSIGNMENT; CONTRACT, 6.

TURNPIKE.

See NUISANCE, 3, 4; WAY, 2.

USAGE.

See EVIDENCE, 17; INSURANCE, 7, 8, 11, 13, 16.

VARIANCE.

See COMPLAINT, 1; INDICTMENT, 2, 3.

VENUE.

See ACTION, 1.

VERDICT.

1. On an indictment for murder, containing several counts in legal form, varying only in the statement of the means of death, if the jury find the defendant guilty of murder in the form set out in either count, they need not return a separate verdict on each count, but may find him guilty generally. *Commonwealth* v. *Desmarteau*, 1.
2. A party whose counsel is present and silent at the return and acceptance of a verdict cannot afterwards object to it upon the ground that the court had been adjourned before the jury came in. *Blake* v. *Bayley*, 531.

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8. If a sheriff's jury summoned to assess damages for the laying out of a town way, after agreeing upon a verdict for one party, sign, seal up and return into court one for the other, through mistake; and this verdict is accepted by the court on motion of the counsel of the first party, made after being informed that it was said by the jury to be in his favor and without examining the verdict itself; the court has power, at a subsequent term, upon petition, before any action has been taken on the judgment, to bring the case forward and vacate or amend the judgment; and the jurors are competent witnesses to prove the mistake. *Capen* v. *Inhabitants of Stoughton*, 364.

See COMPLAINT, 3.

WAGES.

See ASSIGNMENT.

WAIVER.

See CONDITION, 6; PROMISSORY NOTE, 15; VERDICT, 2.

WAREHOUSEMAN.

It is no part of the duty of a warehouseman to make inquiry for, or go in pursuit of, property intrusted to his keeping, after he has once ceased to have possession of it. *Sessions* v. *Western Railroad*, 132.

See CARRIER, 2.

WARRANT OF DISTRESS.

See COUNTY COMMISSIONERS, 3 4.

WATERWORKS.

See CERTIORARI, 3; COUNTY COMMISSIONERS, 4.

WAY.

1. An adjudication of county commissioners, on a petition for the new location of three highways and a fordway, that "the common convenience and necessity require that the prayer of the petitioners should in part be granted," is invalid for uncertainty, and cannot be made good by any subsequent action of the commissioners at a meeting called "to locate as aforesaid." *Yeamans* v. *County Commissioners*, 36.
2. Upon the laying out of a turnpike by the county commissioners as a public highway, the town is not bound by law, or by any previous agreement of the turnpike corporation, and cannot be required by the commissioners, to keep in repair the private way of an individual passing under it. *Baker* v. *Inhabitants of Dedham*, 393.
3. Payment by a town for repairs made by order of one of the selectmen on a way, which the town is under no obligation to keep in repair, will not bind the town to keep it in repair thereafter. *Ib.*

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4. The regularity of the proceedings of county commissioners upon a petition for a jury to assess damages occasioned by the laying out of a town way, of the acts of the sheriff in summoning and impanelling the jury, of the hearing before them, the return of their verdict to the court of common pleas, and its acceptance and affirmance by that court, cannot after such acceptance and affirmance, without exception taken at the time, be disputed and contested by persons who have entered into a recognizance to pay all costs which might arise in such proceedings. *Hamblin* v. *County Commissioners*, 256.

5. An indictment against a town for suffering a highway to be out of repair is supported by proof that the way is inconvenient, without proof that it is absolutely unsafe. *Commonwealth* v. *Inhabitants of Taunton*, 228.

6. On the trial of an indictment against a town for suffering a highway to be out of repair, the jury were instructed, that if, taking into consideration the location of the way and the extent and kind of travel over it, they were satisfied that there was a substantial inconvenience in the use of the road, burdensome to the traveller as compared with other similar ordinary roads, they might find that the way was inconvenient, but proof of slight inconveniencies would not be sufficient. *Held*, that the defendant had no ground of exception. *Ib.*

7. A way cannot be proved to have become a public highway by dedication or prescription, so as to render a town liable for its repair, without proof that it had become such before the passage of *St.* 1846, *c.* 203. *Ib.*

8. In an action against a city for a defect in a highway, the judge declined to instruct the jury that notice to some of the principal citizens who were taxpayers might be reasonable notice to the city of the defect; and instructed them that, in order to prove such reasonable notice, it must appear that the officers of the city having charge of the streets — such as the mayor, aldermen, superintendent of streets, or policemen — had actual notice of the defect, or that the defect had continued so long or been so notorious that if such officers or citizens passing had done their duty, the officers would have known it; but the jury might consider whether the defect was of such a nature that passers by, who saw it, would have been likely forthwith to have informed said officers of its existence. *Held*, that the plaintiff had no ground of exception. *Donaldson* v. *City of Boston*, 508.

9. In an action against a city for injuries caused by an obstruction in the highway, evidence that the obstruction was in the highway on the day before, and had been removed at night, is irrelevant and inadmissible. *Ib.*

10. On the trial of an action against a town for an injury occasioned by insufficient width of and other defects in a highway, the plaintiff may introduce evidence of its width nine months after the injury in connection with evidence that the width has not been changed meanwhile. *Brooks* v. *Inhabitants of Petersham*, 181.

11 On the trial of an action against a town for an injury, received by the plaintiff while driving over a highway, and occasioned by a defect in the way, the jury were instructed that "if the original cause of the accident was a defect in the highway for which the town was liable, and which frightened

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the plaintiff's horse, causing him to run, the mere want of prudent management on the part of the plaintiff or another person in the vehicle after the horse began to run, or the mere fact that the plaintiff's companion imprudently seized the reins and turned the horse from the road, would not exonerate the defendants." *Held*, that the defendants had good ground of exception. *Ib.*

12. A private way, duly established under *St.* 1786, *c.* 67, § 1, for the use of one or more individuals of a town or proprietors therein, is not discontinued by the unity in one person of title to and possession of all the land through which it is located. *Flagg* v. *Flagg*, 175.

13. In the location of a private way laid out by the selectmen and accepted by the town, a description of it as "a bridle road" does not confine the right of way to a particular class of animals or special mode of use. *Ib.*

14. If the owner of land, who uses a way over the land of another to reach a highway, makes a conveyance of his land, "with all his privileges to pass and repass to and from the highway"; and all subsequent conveyances of the same premises, for more than twenty years afterwards, refer to this conveyance for a more full description of the premises conveyed, and the successive owners continue during the whole time to use the way without interruption: a right of way is created by prescription over the intermediate land, even if one of such owners was at the same time a tenant in common of that land. *Reed* v. *West*, 283.

15. The owner of a tract of land conveyed a portion of it, described as bounded in part on "an avenue laid out on a plan" of the whole tract, previously made for the grantor by a certain surveyor; "meaning and intending to convey to the grantee all the land laid out as said avenue, so far as the same is connected with or contiguous to the land above described; and if the said avenue is finally opened, as laid out on said plan, by the agreement of the owners of all the land, then the same is to be open and free to all the abutters thereon from Adams to Elm streets." *Held*, that the fee thus granted in the soil of the way was subject to a right of way in the grantor and his assigns as appurtenant to the rest of the tract. *Held*, *also*, that the way might be identified by the testimony of another surveyor, that shortly before the deed the grantor handed him the plan made by the first surveyor, on which he marked out lots and an avenue in pencil, and caused a number of copies thereof to be lithographed, one of which he produced. *Stetson* v. *Dow*, 372.

16. Where the owners of adjoining tracts of land have conveyed them, agreeing that a strip between them, half on each, shall be used as a way, and reserving the right so to use it, a person having the title of one of them to part of the land, either by inheritance or by deed bounding on the way, describing it as a street, cannot maintain an action of tort for using the strip as a way against one to whom one of such owners grants another part of the land with like boundaries, or with a right of way over the street so far as the grantor can legally grant it. *Sparhawk* v. *Bagg*, 583.

See BRIDGE; CONTRACT, 11; COSTS, 3; EQUITY PLEADING, 3; ESTOPPEL, 2; TOWN, 4, 5.

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WILL.

1. The following proof was offered of the execution of a will entirely in the handwriting of the testatrix and signed by her, to which three other persons had signed their names in the usual place for the signatures of witnesses, but without any attestation clause. The person whose name came first testified as follows: "She passed me a package of papers; asked me to sign my name as a witness; told me where to sign, on the left side." The person whose name was last testified: "She said she wanted me to witness a document; that she had been making a little disposition of her effects, and would like to have me sign it as a witness. She put her finger to the line where she wished me to sign." It appeared that the person whose name was signed between the names of these two was out of the jurisdiction of the court, but had resided in the immediate neighborhood of the testatrix at the time when the will purported to have been executed, and it was also proved that the signature was genuine. *Held*, that this was sufficient proof, in the absence of any evidence or allegation of fraud, of an execution of the will in conformity with the requirements of Rev. Sts. *c* 62, § 6. *Ela* v. *Edwards*, 91.

2. It is no valid objection to a will offered for probate, that it is written on several separate pieces of paper, if the several pieces are connected in their provisions, forming a connected series, and are handed by the testator to the attesting witnesses at the time of their subscription. *Ib.*

3. A will, not under seal, executed before the passage of *St.* 1855, *c.* 304, by a married woman residing in this commonwealth, is a valid disposition of personal property, the right to dispose of which by will has been reserved to her by an antenuptial indenture made between her and her husband in contemplation of marriage without the intervention of a third person as trustee; although, at the time of entering into the contract and of the marriage, the parties resided in another state, by the laws of which a disposition by will under the contract would be ineffectual unless made under seal. *Ib.*

4. A residuary bequest by a widow, "to be equally divided between the heirs of my late husband and the heirs of my brothers and sisters," gives one half to the heirs of her husband, and the other half to the heirs of her brothers and sisters, the division to be made in each case not *per capita*, but by right of representation. *Holbrook* v. *Harrington*, 102.

5. By a devise to the testator's daughter, "during the term of her natural life, and after her decease to her children, with liberty to devise the same at her discretion; but if she should decease without any such devise, then my will is, that all her children inherit the same, share and share alike, to them, their heirs and assigns forever;" all the children of the daughter, whether born before or after the death of the testator, take vested remainders upon the death of the daughter, if not immediately upon the death of the testator; defeasible by devise, but not by deed, of the tenant for life; and by virtue of the Rev. Sts. *c.* 62, § 24, the issue of one of such children who dies after the making of the will, and before the death of the testator, take the parent's share. *Moore* v. *Weaver*, 305.

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6. Under the Rev. Sts. *c.* 59, § 11, and *c.* 62, § 24, a residuary devise of real estate to "my nephew A. and my niece B. and their heirs and assigns forever" is of an estate in common and not in joint tenancy; and if one of the devisees dies before the testator, his or her moiety descends to the testator's heirs at law. *Jones* v. *Crane*, 308.

7. A testator bequeathed a sum of money to trustees, to hold and invest the same, "and to pay over the net income thereof semiannually from my decease to my granddaughter until she shall arrive at the age of twenty one years or be married; and upon her marriage the same to be paid wholly over to her, together with any accumulated interest unpaid thereon; and if at the said age of twenty one years she shall still remain unmarried, then to be paid over to such other trustee as she may select, to be held by such new trustee on the like trust, and to pay over to her the net income thereof in like manner until she shall be married, and the same upon the event of her marriage to be wholly paid over to her; and upon her decease without issue living, the said principal sum to be divided among my lawful heirs then living." The granddaughter married after arriving at twenty one years of age, and did not appoint a new trustee. *Held*, that on her marriage the principal sum, with its accumulations, must be paid over to her. *Bradlee* v. *Appleton*, 575.

8. A testator bequeathed to his daughter A. the sum of one hundred dollars, declaring it to be all that she and her issue could or would ever receive from his estate; to his daughter B. a like sum, and a further sum of five thousand dollars to be held by trustees and paid to her on her marriage or coming of age, and the income meanwhile paid to her annually; to his wife a legacy of twenty thousand dollars, and the income of a fund of one hundred thousand dollars, out of which he directed her to maintain and educate his daughter B; and all the rest and residue of his estate to trustees in trust to pay the income to his daughter B. during her life, and upon her death to pay the income and principal to her issue, or, failing such issue, as she might appoint by will. By a codicil, the testator ratified his will in all respects except as thereby altered or revoked; expressed a desire that his wife at her discretion should use the income bequeathed to her as well for the benefit of his daughter A. as of his daughter B.; and directed that at the death of his wife one half of all his property then remaining and held under his will should be held for the benefit of his daughter A. during her life and at her death go to her children. The testator's wife died before his daughter B. came of age or was married. *Held*, that the codicil revoked the bequest of five thousand dollars in trust for B., and operated upon the testator's whole estate, except the two legacies of one hundred dollars each. *Bedloe* v. *Homer*, 432.

9. A testator gave a legacy "to the Baptist Society in P., the yearly interest of which is to be appropriated to the support of their minister." More than twenty years before the death of the testator a Baptist church had been organized at P., and had ever since maintained its existence; during the same time there had been a meeting-house, owned by pewholders, of whom some were and others were not members of the church, in which worship had been maintained during a considerable portion of the time by members

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of the church, pewholders and other persons; but no society had ever been organized or incorporated, or held any formal meetings or kept any records. *Held*, that the church was not entitled to receive the bequest; but that the persons usually attending worship in the meeting-house constituted an unincorporated religious society, within the meaning of the Rev. Sts. *c.* 20, § 25; and that an agent or trustee to be elected by the adult male members of such society in the manner provided in that section would be entitled to receive it. *Silsby* v. *Barlow*, 329.

See APPEAL, 8; HUSBAND AND WIFE, 3; TRUST.

WITNESS.

1. In this commonwealth, since the Gen. Sts. *c.* 131, § 12, as before, a witness cannot be examined as to his religious belief, either upon the *voir dire* or upon cross-examination. *Commonwealth* v. *Burke*, 33.
2. *It seems*, that the testimony of the assured to the statements of the president of an insurance company after the writing of the policy, as evidence of a usage tending to explain it, is not rendered incompetent, under the statutes of this commonwealth, by the death of the president. *Fay* v. *Alliance Ins. Co.* 455.
3. Since the *St.* of 1852, *c.* 312, § 60, the wife of a person interested in the result of a suit, but not a party to the record, is a competent witness in his behalf. *Peaslee* v. *McLoon*, 488.
4. At the trial of an action against two defendants for a joint assault and battery, the defendants answered jointly, denying the assault, and averring that any acts committed by them were done in self-defence; and the evidence tended to show that one defendant assaulted and had an affray with the plaintiff, in which the other defendant took no part, that, at the close of this affray, and at a point more than forty feet from where it begun, the second defendant assaulted and had an affray with the plaintiff, in which the first defendant took no part, and that each defendant was present during the affray between the plaintiff and the other. *Held*, that the wife of one defendant was not a competent witness for the other. *Blake* v. *Lord*, 387.
5. On a trial on appeal from the judgment of a trial justice, a witness for the Commonwealth, who testifies on cross-examination that he cannot swear that he has not been threatened in relation to his testimony on this trial, and that the trial justice has intimated to him that all proceedings against him for a breach of his recognizance would be stayed if he would now testify against the defendant, may be asked by the district attorney on re-examination as to the particulars of a conversation between them, for the purpose of proving that the district attorney assured the witness, before calling him, that no prosecution should be urged against him for a default on his recognizance. *Commonwealth* v. *Bent*, 239.
6. An inhabitant of another state, who comes into this commonwealth solely for the purpose of attending court as a witness, is privileged from arrest on

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civil process, although he has not been summoned nor obtained a writ of protection. *May* v. *Shumway*, 86.

See BASTARDY PROCESS: VERDICT, 3.

WORK AND LABOR.

See ASSIGNMENT; CONTRACT, 11.

WRIT.

See EQUITY PLEADING, 1.

WRIT OF ENTRY.

See MORTGAGE, 2, 3.

WRIT OF PROTECTION.

See WITNESS, 6.

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